Petition

81-252

No. 81-.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

CARL R. DUNCAN, on behalf of himself and all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Is an order granting a motion to disqualify counsel an appealable order under the "collateral order" doctrine, even though an order *denying* disqualification is not appealable under this Court's holding in *Firestone Tire & Rubber Co.* v. *Risjord,* 101 S.Ct. 669 (1981)?

[This issue was expressly reserved in *Firestone,* 101 S.Ct. at 672 n.8.]

2. In seeking disqualification of its former counsel from representing its adversary under Canon 4 of the ABA Code of Professional Responsibility, does the moving party bear the burden of establishing that its former counsel actually possesses specific, relevant, confidential information, or is it sufficient to establish that the prior representations are substantially related to the pending litigation?

3. In seeking disqualification of its former counsel from representing its adversary under Canon 9 of the ABA Code of Professional Responsibility based upon an appearance of impropriety, does the moving party bear the additional burden of establishing that its former counsel engaged in substantive misconduct under some other Canon of the Code?

Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., a New York Stock Exchange listed company. All affiliates of Merrill Lynch, Pierce, Fenner & Smith Incorporated are direct or indirect wholly-owned subsidiaries of Merrill Lynch & Co., Inc.

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at 646 F.2d 1020 and appears at Appendix A. The order of the United States District Court for the Southern District of Florida is unreported and appears at Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statute and Canons Involved

United States Code, Title 28, § 1291 (1976):

Final decisions of the district courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Canon 4 of the ABA Code of Professional Responsibility: A Lawyer Should Preserve the Confidences and Secrets of a Client.

Canon 9 of the ABA Code of Professional Responsibility: A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

Statement of the Case

A. The Pending Action

This purported securities class action was instituted on November 22, 1978 in the United States District Court for the Southern District of Florida on behalf of the named plaintiff, Carl Duncan ("Duncan"), and all other persons similarly situated against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"). The complaint, as amended, alleges claims on behalf of all Merrill Lynch customers who purchased securities from or sold securities to Merrill Lynch: (a) where Merrill Lynch acted as a principal in the transaction; (b) where non-transaction appreciation was generated in the customers' special miscellaneous accounts; or (c) where unrealized appreciation in the cus-

tomers' special miscellaneous accounts was used to reduce the amount of cash necessary for purchases in their cash accounts.* The amended complaint contains seven counts for unspecified violations of various provisions of the federal securities laws, of Regulation T promulgated by Board of Governors of the Federal Reserve System, 12 C.F.R. § 220 (1980), of the Florida blue sky statute, Chapter 517, Fla. Stat. (1972), common law fraud and breach of fiduciary duty. Jurisdiction is alleged generally to arise under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1976), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1976), and Chapter 517, Fla. Stat. Duncan, for himself and on behalf of the purported classes, demands compensatory damages estimated to exceed $10,000,000, punitive damages estimated to exceed $100,000,000, and an injunction against future violations.

B. The Prior Representation of Merrill Lynch by Respondent's Law Firm

The law firm of Smathers & Thompson (the "Smathers firm"), which had previously acted as counsel for Merrill Lynch in numerous matters, appeared as counsel for plaintiff Duncan.** The litigation in which the Smathers firm represented Merrill Lynch involved stocks and bonds, commodities, municipal and government securities, margin accounts, Merrill Lynch's relationships with its customers, Merrill Lynch's relationships with its employees, and Merrill Lynch's internal policies and procedures. The work

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* Respondent's amended complaint appears at Appendix C. The amended complaint, filed on December 28, 1978, purports to assert claims on behalf of a second class consisting of all Florida customers of Merrill Lynch who maintained margin accounts in which Merrill Lynch allegedly charged usurious rates of interest under Florida law.

** A list of cases in which the Smathers firm represented Merrill Lynch during the last ten years appears at Appendix D.

performed by the Smathers firm included reviews of Merrill Lynch records, conferences with Merrill Lynch officers and employees, legal research, discovery proceedings, preparation of witnesses, hearings, motions, trials and appeals. The Smathers firm performed its work in close association with attorneys in the Merrill Lynch Law Department and with other Merrill Lynch representatives who were involved in the litigated matters.

In particular, Merrill Lynch retained the Smathers firm to handle the trial and appellate litigation in *McCormick* v. *Esposito*, 500 F.2d 620 (5th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975), involving a customer account maintained at Goodbody & Co., which was acquired by a wholly-owned subsidiary of Merrill Lynch in December, 1970. In July, 1971, McCormick commenced an action alleging illegal extensions of credit in violation of Regulation T and of the New York Stock Exchange rules relating to maintenance margin requirements. The issues presented to and ultimately decided by the Fifth Circuit concerned the propriety under Regulation T of the use by brokerage firms of special miscellaneous accounts. As part of the Goodbody acquisition, Merrill Lynch undertook the defense of all litigation, including responsibility for attorneys' fees, arising out of Goodbody's business and operations, subject to possible later indemnification by the New York Stock Exchange. Thus, Merrill Lynch's attorneys directed and were responsible for the actions taken by the Smathers firm in *McCormick* in defense of Merrill Lynch's wholly-owned subsidiary.

C. The Prior Disqualification of the Smathers Firm in the *Behar* Case

In September, 1977, while still acting as counsel to Merrill Lynch, the Smathers firm entered an appearance on behalf of the plaintiffs in a Florida state court action against Mer-

rill Lynch entitled *Behar* v. *Merrill Lynch*. Merrill Lynch advised the Smathers firm that it considered its conduct improper. On December 12, 1977, a partner in the Smathers firm informed Merrill Lynch that the firm no longer wished to represent Merrill Lynch because Merrill Lynch had employed other lawyers in Florida and the litigation in which the Smathers firm then represented Merrill Lynch had become inactive. The propriety of the Smathers firm's appearance on behalf of the *Behar* plaintiffs was ultimately submitted to the Professional Ethics Committee of the Florida Bar Association, whose staff counsel rendered an oral decision at the end of August, 1978 in favor of Merrill Lynch, recommending that the Smathers firm withdraw as counsel for the plaintiffs. When asked if it wanted a written decision from the Committee, the Smathers firm declined.

D. The Disqualification Order of the District Court

The initial complaint in this action was filed on November 22, 1978, one week after the Smathers firm formally withdrew from representation of Merrill Lynch in other litigation. After the complaint was amended as of right, Merrill Lynch promptly moved to disqualify its former counsel from continuing to represent the plaintiff. The disqualification motion was argued on April 18, 1979 before the Honorable Norman C. Roettger, U.S.D.J., who had previously presided over two matters in which the Smathers firm had represented Merrill Lynch.

By order dated July 28, 1979, the district court granted the motion to disqualify the Smathers firm, formulating the determinative issue as follows:

> Did Smathers & Thompson's prior representations of Merrill Lynch involve issues *substantially related* to matters in the above styled cause? If so, the presump-

> tion arises that confidential information was passed, requiring the conclusion that Smathers & Thompson be disqualified.

(B-2) (emphasis in original). The district court concluded:

> [T]he court feels that Smathers & Thompson would certainly have been exposed to information which would be substantially related to the instant case. It seems clear that a law firm that is privy to a client's procedures and policies, and is able to examine internal memoranda as well as interview witnesses, is certainly given an opportunity to benefit from any privileged information so gathered in a subsequent law suit against that client. . . . Certainly Smathers & Thompson would have learned things during the course of the representation which would aid them unfairly in the prosecution of their action.

(B-4, 5) The district court also noted that it was mindful of Canon 9 of the ABA Code of Professional Responsibility (the "Code"), which prohibits even the appearance of impropriety, and concluded that disqualification of the Smathers firm was required. (B-5, 6)

E. The Fifth Circuit's Decision

The Fifth Circuit vacated the order of the district court and remanded for a factual hearing. The court first considered whether the order disqualifying the Smathers firm was an appealable order. It concluded that such orders fall within the collateral order doctrine, distinguishing this Court's holding in *Firestone Tire & Rubber Co.* v. *Risjord*, 101 S.Ct. 669 (1981), on the theory that orders granting disqualification cannot be effectively reviewed on appeal from final judgment. (646 F.2d at 1027; A-15)

The court then considered whether a violation of either Canon 4 or 9 of the Code had been established. The court held that the district court had erroneously placed upon plaintiff the burden of proving that the substantial relationship test had *not* been met, and concluded that, in any event, insufficient evidence had been adduced by Merrill Lynch to demonstrate that a substantial relationship existed between the Smathers firm's prior representation of Merrill Lynch and the pending *Duncan* litigation. (646 F.2d at 1028; A-18, 19)

With respect to the *McCormick* action, the court conceded that the substantial relationship test had been satisfied, but concluded that because the events that gave rise to that litigation had preceded Merrill Lynch's acquisition of Goodbody & Co., it was "simply not reasonable to irrebuttably presume that Smathers & Thompson, though employed by Merrill Lynch, had access to Merrill Lynch's confidences and secrets." (646 F.2d at 1030; A-23) The court speculated that the Smathers firm had "probably no opportunity" to acquire information about Merrill Lynch in the course of that representation, despite the fact that attorneys from the Merrill Lynch Law Department directed the litigation. It held, therefore, that Merrill Lynch must prove on remand that information was in fact disclosed to the Smathers firm which is relevant to the *Duncan* action. (646 F.2d at 1031; A-23, 24) More generally, the court went on to state that Merrill Lynch "must prove that Smathers & Thompson has knowledge of the particular practices and procedures which are the subject of Duncan's suit . . . either by establishing [a substantial relationship] or *by pointing to specific instances where it revealed relevant confidential information.*" (646 F.2d at 1032; A-26, 27) (emphasis supplied).

With respect to Canon 9, the court held that Merrill Lynch had failed to prove that an actual violation of

Canon 4 had occurred, and thus, under the standard employed by the Fifth Circuit, no appearance of impropriety had been established. (646 F.2d at 1032; A-28) The court also reasoned that, although the Smathers firm had previously attempted to represent the plaintiffs in the *Behar* action against Merrill Lynch, and had acquiesced in a decision by the Professional Ethics Committee of the Florida Bar Association that the firm should withdraw, this did not give rise to a Canon 9 violation because any appearance of impropriety had been "purged" by the Smathers firm's withdrawal as counsel for plaintiffs in that action. (646 F.2d at 1033; A-28)

REASONS FOR GRANTING THE WRIT

I.

The Appealability of Orders Granting Disqualification of Counsel Is an Important Question of Federal Appellate Jurisdiction That Should Be Determined by This Court.

The appealability of orders granting disqualification of counsel is an issue that this Court expressly left undecided in *Firestone Tire & Rubber Co.* v. *Risjord*, 101 S.Ct. 669, 672 n.8 (1981). Like the Fifth Circuit below, the courts of appeals have generally assumed that such orders satisfy the requirements of the collateral order doctrine. In so doing, these courts have failed to apply the standards for appealability of interlocutory orders required by this Court's recent decisions construing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). These standards were recently restated in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), as follows:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must

> conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

437 U.S. at 468; *Firestone,* 101 S.Ct. at 674. Orders granting disqualification of counsel, like orders denying disqualification, *see Firestone, supra,* do not satisfy the requirements for "the 'small class' of decisions excepted from the final judgment rule". This Court should grant the petition for certiorari to stem the tide of interlocutory appeals from disqualification orders that has been engendered by the *Cohen* doctrine.

A. Orders Disqualifying Counsel Do Not Concern Issues That Are Effectively Unreviewable on Appeal From Final Judgment

This Court's decisions in *Cohen, Livesay,* and *Firestone* require that an order be "effectively unreviewable on appeal from a final judgment" in order to satisfy the requirements of the collateral order doctrine. These decisions hold that the delay and inconvenience of litigating while awaiting appeal from a final judgment do not satisfy the *Cohen* criterion of being effectively unreviewable. Rather, the order must be such that the "denial of immediate review would render impossible any review whatsover," *Firestone,* 101 S.Ct. at 675 (quoting *United States* v. *Ryan,* 402 U.S. 530, 533 (1971)), a requirement that the courts of appeals, at least in the disqualification context, seem unwilling to take seriously.

Examination of some of the cases in which this Court has found interlocutory orders to be "collateral" under *Cohen* reveals that the rights that can be vindicated only by immediate appellate review are very different from the right asserted here. For example, a defendant's right to

require the plaintiff in a derivative action to post security for costs, the issue in *Cohen*, cannot be vindicated by reversal on appeal from a final judgment because the security requirement is meaningful only if it is imposed at the commencement of the litigation. Thus, any ruling thereon would be moot after entry of final judgment. Similarly, in *Stack* v. *Boyle*, 342 U.S. 1 (1951), this Court found the question of a right to reduction of bail to involve a collateral order under *Cohen* because, like the right to require security for costs, it was a question that would be rendered moot if not immediately reviewed. And in *Abney* v. *United States*, 431 U.S. 651 (1977), an order deciding a claim of double jeopardy was held to be appealable because an appeal from final judgment could not have vindicated the defendant's right not to be re-tried. These decisions hold that the *Cohen* doctrine must be limited to appeals from orders that otherwise would escape appellate review because reversal on appeal from final judgment would come too late to cure the allegedly improper ruling by the district court. In contrast, rulings on motions to disqualify counsel may be raised on appeal from final judgment, and may lead to reversal and a new trial. Because interlocutory appellate review is unnecessary to ensure that such orders do not evade appellate review altogether, such orders are not "effectively unreviewable" within the meaning of *Livesay* and *Cohen*.

In *Firestone*, this Court considered whether orders denying disqualification of counsel are effectively unreviewable on appeal from final judgment within the meaning of *Cohen* and *Livesay*. The Court concluded that they are not, holding that post-trial review of the propriety of the continued representation was adequate to vindicate the rights of the moving party, and that the potential harm caused by deferring appellate review does not differ significantly from that which may result from other interlocutory orders.

101 S.Ct. at 675. In this action, the Fifth Circuit purported to apply the *Livesay* formulation of the *Cohen* test as construed in *Firestone*. In examining whether orders granting disqualification are effectively unreviewable on appeal from final judgment, the court stated that such deferred review would "seldom provide any solace to the party erroneously deprived of his chosen counsel", and that "the disqualified counsel is not likely to find any remedy for the damage to his reputation or to his pocketbook". (646 F.2d at 1027; A-15) Accordingly, the court held that "unlike the situation in *Firestone*, the harm caused by postponing review of an order granting disqualification of counsel would in most instances be irreparable." (646 F.2d at 1027; A-15) The court thus engaged in precisely the speculation as to possible harm that this Court rejected in *Firestone*. *Firestone*, 101 S.Ct. at 675, 676 n.13.*

The impropriety of allowing immediate interlocutory review of orders disqualifying counsel is underscored by the unavailability of such review for orders denying disqualification. A litigant moves to disqualify his former attorney for violating Canon 4 because of his legitimate expectation that his communications with that attorney will remain confidential and will certainly not be used against him. The attorney's current client, however, retains that attorney subject to any pre-existing obligations and professional responsibilities that such counsel may have. Thus, the considerations that underlie the former client's right to prevent his attorney from breaching a duty long owed to him are at least as compelling as the right of the new-

* The Fifth Circuit seized upon a reference in *Firestone* to the difficulty of assessing the impact of a denial of disqualification before the termination of the litigation, *id.* at 675, and used the converse of this observation to justify appeals from orders granting disqualification on the grounds that the impact of such orders can immediately be assessed. (646 F.2d at 1027; A-15)

comer to have counsel of his choice; yet, if a motion to disqualify is denied, the order is considered effectively reviewable on appeal from final judgment and is not immediately appealable under *Firestone*. To hold, on the other hand, that the current client has the right to appeal from an order *granting* disqualification is to make the jurisdictional question of appealability depend upon an assessment of the importance of the issue to the parties.* Such a fundamental discriminatory result arises from a policy determination rather than from a construction of the jurisdictional statute and, therefore, it is clearly within the prerogative of Congress. In *Livesay*, this Court noted the impropriety of allowing appeals from orders granting class certification while denying the appealability of orders denying class certification, 437 U.S. at 476; the appealability of an order relating to attorney disqualification should similarly be independent of the outcome of the motion to disqualify.

B. Orders Disqualifying Counsel Do Not Raise Important Questions That Are Independent of the Merits of the Action

To fall within the collateral order doctrine, not only must an interlocutory order be effectively unreviewable on appeal from final judgment, but the question decided by the order must be "serious and unsettled". *Cohen*, 337 U.S. at 547. In *Livesay*, this Court reaffirmed this requirement, stating that the order must "resolve an important issue completely separate from the merits of the action". *Livesay*, 437 U.S. at 468. In *Firestone*, this Court assumed without deciding that orders denying disqualification meet this criterion. 101 S.Ct. at 674. In the *Duncan* decision

* The Fifth Circuit also appears to have taken into account counsel's interest in his prospective attorney's fee (646 F.2d at 1025 n.6, 1027; A-10 n.6, 15), an unusual consideration in an ethical dispute, at least from the former client's perspective.

below, the Fifth Circuit gave lip service to this prong of the *Livesay* test, stating in a footnote without discussion that an order granting disqualification does resolve an important question completely separate from the merits.* (646 F.2d at 1026 n.9; A-14 n.9) The issues raised by a motion to disqualify, however, are primarily factual rather than legal, involving questions as to whether there is a "substantial relationship" between the prior and current representation and whether the attorney's conduct gives rise to an appearance of impropriety. Until the Fifth Circuit decision on the disqualification issue below, *see* Point II, *infra*, the law governing disqualification of counsel was straightforward, and the sole issue presented to the district court was the application of that law to the facts of the particular case. Interlocutory appellate review as of right of orders involving the application of settled rules of law to disputed questions of fact cannot be justified by the "serious and substantial question" test of *Cohen* or the "importance" test of *Livesay*.

A related requirement of the *Cohen* doctrine is that the issue raised on appeal be "independent" or "collateral", a requirement restated in *Livesay* as "completely separate from the merits of the action". 437 U.S. at 468. The question of disqualification of counsel for an alleged violation of Canon 4 can never be independent of the substantive litigation, however, because counsel must necessarily argue that their prior representation of the moving party did not involve matters that are relevant to the issues raised in the pending litigation. The question whether the "substantial relationship" test is satisfied must necessarily focus upon the nature of the pending action. Thus, the question of

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* The court also stated in a footnote, "This circuit, however, has not insisted upon the 'serious and unsettled question' requirement" in appeals involving disqualification motions. (646 F.2d at 1024 n.5; A-9 n.5)

disqualification is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action", and cannot, therefore, satisfy the collateral order test. *See Livesay*, 437 U.S. at 469 (citation omitted).

II.

The Requirement That a Former Client Seeking Disqualification Reveal Confidential Information Is Inconsistent With Canon 4 of the Code of Professional Responsibility and With the Decisions of the Other Courts of Appeals.

This Court recently granted certiorari to resolve "important questions concerning the scope of the attorney-client privilege in the corporate context", *Upjohn Co.* v. *United States*, 101 S.Ct. 677 (1981), but the Court has not had occasion to address the protection to be afforded to that privilege when the attorney-client relationship has come to an end and the attorney seeks to represent a party in an action against his former client. This aspect of the attorney-client privilege, which comes within the protections of Canon 4 of the Code, is of increasing significance to corporate and individual clients alike, and should be addressed by this Court. The decision below seriously undermines the protections of Canon 4, makes significant inroads on the attorney-client privilege, and is in direct conflict with decisions from other Circuits. Accordingly, the Court should grant certiorari to resolve this conflict and to ensure continued recognition and enforcement of the client's inviolable privilege of confidentiality, notwithstanding the termination of the attorney-client relationship.

Until the Fifth Circuit's decision below, the law relating to the disqualification of attorneys in actions against for-

mer clients was settled and unexceptionable. The general rule was that

> a former client seeking to disqualify an attorney who appears on behalf of his adversary, need only to show that the matters embraced within the pending suit are *substantially related* to the matters or cause of action wherein the attorney previously represented him.

Wilson P. Abraham Const. Corp. v. *Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977) (emphasis in original). *Accord, Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). Under this rule, once it appeared that a substantial relationship existed, a presumption arose that confidential information had been disclosed. In *Emle, supra,* the court stated:

> Moreover, the court need not, indeed cannot, inquire whether the lawyer did, *in fact,* receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.

478 F.2d at 571 (emphasis in original). Thus, the former client could not be forced to waive his privilege by proving that confidences were in fact disclosed, thereby simultaneously revealing the very substance of those privileged matters. This approach, long applied in the federal courts, clearly vindicates the considerations that underly Canon 4.

In contrast, the approach adopted by the Fifth Circuit below seriously threatens the protection of the attorney-client privilege that Canon 4 affords. In imposing a requirement that the district court perform a "painstaking analysis" of the "subject matters, issues, and causes of action" involved, the court stated:

> [Merrill Lynch] must prove that *Smathers & Thompson has knowledge of the particular practices and procedures which are the subject matter of Duncan's suit.* It can do this either by establishing that the present and previous representations were substantially related or *by pointing to specific instances where it revealed relevant confidential information* regarding those practices and procedures.

(646 F.2d at 1032; A-26, 27) (emphasis added). Although the court purported to invoke the "substantial relationship" test, it adopted a new requirement to the effect that only by pointing to specific confidential disclosures can a former client disqualify its former counsel.*

The Fifth Circuit specifically discussed an action in which the Smathers firm represented Goodbody & Co., Inc., a wholly-owned subsidiary of Merrill Lynch. The plaintiff, like the plaintiff here, alleged that improper extensions of credit had been made in his special miscellaneous account.

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* In the seminal case on the "substantial relationship" test, *T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953), the court stated:

> To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.

McCormick v. *Esposito*, 500 F.2d 620 (5th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975). Pursuant to the terms of the acquisition of Goodbody & Co. by Merrill Lynch, Merrill Lynch's attorneys directed the litigation and were responsible for the actions taken by the Smathers firm.

The Fifth Circuit conceded that a substantial relationship existed between the matters embraced in the *McCormick* action and the issues raised by *Duncan*, but refused to presume that confidential information was disclosed in the course of the *McCormick* litigation that might assist the Smathers firm here. (646 F.2d at 1030; A-23) The court speculated that the Smathers firm had "probably no opportunity" to acquire information about Merrill Lynch in the course of that representation, and required Merrill Lynch to prove on remand that information was disclosed that is relevant to this action. (646 F.2d at 1031; A-23, 24)*

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* A reading of the *Duncan* complaint in light of the *McCormick* decision graphically illustrates the impossible position in which the Fifth Circuit has placed Merrill Lynch with respect to its attorney-client privilege. It is required to reveal the nature of the confidences disclosed to the Smathers firm while Merrill Lynch attorneys were involved with the *McCormick* litigation in order to vindicate its clear right to continued confidential treatment of those precise matters. Duncan charges that Merrill Lynch committed some impropriety in connection with its sale to him of certain municipal bonds. It is alleged that the price charged for the bonds was above their market value, and that the "funds or securities due" notice sent to Duncan did not accurately reflect the price he was charged. It defies belief to assert that the Smathers firm could concoct from these facts allegations relating to Merrill Lynch's procedures with respect to special miscellaneous accounts, had they not discussed those procedures with Merrill Lynch while representing its wholly-owned subsidiary in the *McCormick* action. To presume that because the events giving rise to the *McCormick* litigation preceded the Goodbody acquisition, Merrill Lynch's attorneys never discussed Merrill Lynch's procedures relating to special miscellaneous accounts with attorneys from the Smathers firm, is to ignore the realities of the attorney-client relationship and how it functions in practice. It also substantially undercuts the candid give-and-take intended to be fostered by the attorney-client privilege.

Thus, in order to meet the burden of proof imposed by the court below, a party seeking disqualification must air its confidences in public, risking an impairment of its position on the merits of the litigation in its effort to prove that its former attorney is already privy to those confidences. To impose such a burden undermines the purpose of Canon 4, vitiates the attorney-client privilege, and places the former client in an untenable position: the choice of allowing its former counsel to proceed with the litigation or of revealing publicly those matters which it assumed would be protected from disclosure by the attorney-client privilege. The Fifth Circuit's unprecedented approach to this issue repudiates the fundamental ethical concerns that led to the promulgation of Canon 4.

III.

The Standard Employed by the Fifth Circuit to Determine Whether a Violation of Canon 9 Has Occurred Renders That Canon a Nullity.

Canon 9 of the ABA Code of Professional Responsibility states:

> A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

It is apparent that this Canon is intended to uphold the ethical reputation of the judicial system and of the legal profession, notwithstanding the absence of any specifically identifiable, substantive impropriety under any other Canon of the Code. The Fifth Circuit below, however, engrafted a second requirement on this Canon—not a mere appearance of impropriety, but also proof of some other substantive misconduct, thereby rendering Canon 9 a nullity.

In *Woods* v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), the Fifth Circuit established a two-part standard for Canon 9 violations. First, the district court must find "a reasonable possibility that some specifically identifiable impropriety did in fact occur", 537 F.2d at 813, and second, the court must find that the "likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case". *Id.* at 813 n.12. The application of this standard in the instant case reveals that in order to meet the first prong, one must prove that a violation of some other Canon has occurred. The court first concluded that Merrill Lynch had failed to satisfy the initial prong because it had not demonstrated a violation of Canon 4, stating, "Because no impropriety [under Canon 4] has been proved, a Canon 9 violation cannot be premised on this ground." (646 F.2d at 1032; A-28)* Second, the court refused to find a Canon 9 violation in the fact that the Smathers firm had previously brought an action against Merrill Lynch while Merrill Lynch was still its client, in violation of Canon 5. Although the Smathers firm had acquiesced in an oral decision by the Professional Ethics Committee of the Florida Bar that the firm should withdraw from the *Behar* action, the Fifth Circuit failed to find any Canon 9 violation because "any appearance of impropriety presented by that case was purged when Smathers & Thompson withdrew as counsel for the [plaintiffs in the *Behar* action]." (646 F.2d at 1033; A-28) The court thus assumed that because the Canon 5 violation had, in its view, been cured, no violation of Canon 9 inhered in the situation.

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* In light of the longstanding relationship between the Smathers firm and Merrill Lynch, this conclusion seems illogical, especially because, as the district court observed, "the complaint against the former client alleges conduct that would have to have been pervasive and consistent enough to injure an entire class of plaintiffs." (B-5).

We submit that the Fifth Circuit, in an extensive footnote, strained to justify the conduct of the Smathers firm in connection with its representation of the *Behar* plaintiffs in their action against Merrill Lynch. (646 F.2d at 1022 n.3; A-5 n.3) We further submit that by its begrudging interpretation of Canon 9, the Fifth Circuit seriously eroded the Canon's essential purpose—to ensure unquestioned public confidence in the legal system. Although it acknowledged that the Florida Ethics Committee had recommended that the Smathers firm withdraw from the *Behar* action, the court nevertheless rationalized that this was not a "disqualification" but simply an advisory opinion with no binding effect, although an attorney who ignored the opinion would do so "at risk of violating the underlying canon". *Id.* Judicial nitpicking of this nature in a question of professional ethics does nothing to vindicate either the purposes of the Code or the specific concerns and dictates of Canon 9. Moreover, the impropriety committed by the Smathers firm in the *Behar* matter did not simply involve a technical conflict of interest under Canon 5; it involved the more serious misconduct of turning one's back on a longstanding client on the wholly indefensible basis that the client was not currently giving the firm enough business. While the withdrawal of the firm from the *Behar* action may have "purged" the Canon 5 violation, the appearance of impropriety that has pervaded the firm's conduct vis-à-vis Merrill Lynch cannot be so easily rectified or forgotten. The standard for Canon 9 violations employed by the Fifth Circuit, which inexplicably excludes conduct, however unprofessional or vindictive, that fails to fall within the scope of some other substantive requirement of the Code of Professional Responsibility, should be overturned forthwith and the high ethical standard embodied in the Code reaffirmed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 7, 1981

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT—UNIT B

No. 79-3112

CARL R. DUNCAN, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellee.

June 1, 1981

Customer brought securities fraud suit against stock brokerage firm. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., granted the brokerage firm's motion to disqualify the law firm representing the customer and customer appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that: (1) the order granting the disqualification motion was a "final decision" immediately appealable to the Court of Appeals; (2) the district court misallocated the burden of proof; and (3) the record represented insufficient evidence to establish a "a substantial relationship" between this case and the law firm's prior representation of the brokerage firm.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Florida.

Before:

GODBOLD, *Chief Judge*, MORGAN and HENDERSON, *Circuit Judges.*

LEWIS R. MORGAN, *Circuit Judge*:

This is an appeal from a district court order granting the defendant's motion to disqualify the law firm representing the plaintiff in a complex securities fraud action. Two questions are presented for our review. First, we must decide whether an order granting a disqualification motion is a "final decision" immediately appealable to this court under 28 U.S.C. § 1291. Finding that such an order is an appealable final decision, we have jurisdiction to consider the second question of whether the district court properly determined that disqualification of the law firm representing the plaintiff was required in this case. For reasons discussed below, we conclude that the district court misallocated the burden of proof applicable in a disqualification proceeding and failed to make the painstaking factual analysis required by our cases. We therefore remand for further proceedings.

I.

In November 1978 Carl R. Duncan filed a complaint against Merrill Lynch, Pierce, Fenner & Smith, Inc., alleging that Merrill Lynch had made untrue statements of material fact and had omitted to state material facts in connection with the sale of certain municipal bonds to Duncan. Duncan retained the law firm of Smathers & Thompson to represent him in the action. Suing on behalf of himself and all others similarly situated,[1] Duncan as-

[1] Although Duncan's complaint contained class action allegations, the district court, on a motion by Merrill Lynch, stayed the

serted that Merrill Lynch had violated unspecified provisions of the federal securities laws, Regulation T of the Federal Reserve Board, 12 C.F.R. § 220, and the Florida blue sky statute, Chapter 517, Fla. Stat. He also alleged common law fraud and breach of fiduciary duties and, in an amended complaint, claimed violations of the Florida usury laws.

The complaint briefly sketched the common questions of fact upon which the alleged violations were founded. Duncan claimed that in purchasing and selling bonds for its customers Merrill Lynch had (1) acted as an undisclosed principal, (2) sold bonds out of its own inventory without disclosing that the bonds were available elsewhere at a lower price, (3) obtained commitments from customers for bond purchases at a specified price and then had purchased the bonds in the market at a lower price, (4) purchased bonds from customers at below the market price without advising that the bonds would obtain a higher price in other markets, and (5) failed to advise customers that it charged a commission on its bond transactions. Duncan further alleged that Merrill Lynch had, in violation of Regulation T, manipulated "buying power" generated in customers' margin accounts to reduce the amount of cash necessary for purchases in customers' cash accounts. Duncan, for himself and on behalf of the purported class, demanded compensatory damages in an amount estimated to exceed $10,000,000, punitive damages in an amount estimated to exceed $100,000,000, attorneys fees and costs, and an injunction against future occurrences of the alleged violations.

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action pending a resolution of the disqualification question and thereby prevented any discovery on the class action question and precluded Duncan from filing a motion that the action be maintained as a class action.

Rather than responding to the complaint, Merrill Lynch filed a motion to disqualify the law firm of Smathers & Thompson from representing Duncan or any other member of the purported class in the action. Merrill Lynch asserted that Smathers & Thompson had previously represented it in a number of cases that bore a "substantial relationship" to the issues raised in Duncan's action. Relying on Canons 4 and 9 of the American Bar Association Code of Professional Responsibility,[2] Merrill Lynch argued that Smathers & Thompson should be prohibited from utilizing the confidential and privileged information acquired by the firm during its previous representation of Merrill Lynch.

As evidence of the requisite "substantial relationship" between the prior representation and the present suit, Merrill Lynch filed an accompanying affidavit of one of its vice presidents listing ten different matters in which Smathers & Thompson had represented Merrill Lynch over a ten-year period. The affidavit did not separately discuss the nature of these cases but stated generally that these matters

> involved stock, commodities, municipal and government securities, margin accounts, Merrill Lynch's relationships with its customers, Merrill Lynch's relationships with its employees, Merrill Lynch's procedures and its records, the rules and regulations of various regulatory bodies, the federal securities laws, the Florida securities laws and specifically Chapter 517, class ac-

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[2] ABA Code of Professional Responsibility [hereinafter cited as ABA Code]. Canon 4 states that "[a] lawyer should preserve the confidences and secrets of a client." Canon 9 states that "[a] lawyer should avoid even the appearance of professional impropriety."

Local Rule 16(E)(4) of the United States District Court for the Southern District of Florida adopts the ABA Code as the standard for professional conduct in that court.

tions and common law. The work performed by the Smathers firm has included reviews of Merrill Lynch records, conferences with Merrill Lynch officers and employees, legal research, depositions, interrogatories, requests to produce, expert witnesses, hearings, motions, trials and appeals. The Smathers firm has performed its work in various parts of Florida and in New York, and attorneys in the Merrill Lynch Law Department have worked closely with lawyers from the Smathers firm, as have other Merrill Lynch representatives who were involved in the matters. In connection with these listed cases, Merrill Lynch has paid the Smathers firm some $85,000 in the last five years.

The affiant then noted that in the case *McCormick* v. *Esposito*, 500 F.2d 620 (5th Cir. 1974), *cert. denied*, 420 U.S. 912, 95 S.Ct. 834, 42 L.Ed.2d 842 (1975), Smathers & Thompson had defended a stock brokerage firm, Goodbody & Co., which had been acquired by a wholly owned subsidiary of Merrill Lynch in 1970. The affiant observed that the plaintiff in *McCormick* had alleged violations of Regulation T and of the New York Stock Exchange Rules relating to maintenance margin requirements and suggested that the *McCormick* case involved issues "remarkably similar" to those presented in the Duncan case.[3]

[3] The affiant also referred to a case filed in state court styled *Behar* v. *Merrill Lynch*. In September 1977 Earl Waldin, a member of the Smathers firm, entered an appearance as co-counsel on behalf of Sami and Matilde Behar in an action they had filed against Merrill Lynch in 1976. (Merrill Lynch had earlier employed counsel other than Smathers & Thompson to defend it in the *Behar* action and, by 1977, had ceased using Smathers & Thompson in any new cases filed in Florida.) Merrill Lynch moved to strike Waldin's appareance on the ground that Smathers & Thompson was then representing Merrill Lynch in other litigation, specifically *Alderson* v. *Citrus Associates*. On December 12,

In the memorandum accompanying its disqualification motion Merrill Lynch, in addition to restating each allegation made in the affidavit, elaborated somewhat upon two of the ten cases listed by the vice president in his affidavit. Merrill Lynch stated that in *Alderson* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, Smathers & Thompson had represented Merrill Lynch and three of its employees in a securities action brought by a plaintiff who had maintained a margin account with Merrill Lynch. The memorandum stated that

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1977, Waldin wrote Merrill Lynch informing it that regardless of the outcome of its motion to strike Waldin's appearance in *Behar*, Smathers & Thompson no longer desired to represent Merrill Lynch in *Alderson*. In the letter Waldin pointed out that the *Alderson* case had been stayed in March 1975 and had remained dormant since that date. Waldin further noted that since Merrill Lynch had ceased using Smathers & Thompson to represent it in Florida, the *Alderson* case was the only matter still remaining open in the firm's files.

The propriety of Waldin's appearance in *Behar* was ultimately submitted by Waldin to the Committee on Professional Ethics of the Florida Bar. After a member of the committee rendered an oral opinion that Waldin should withdraw, Smathers & Thompson withdrew from representing the Behars.

The affiant stated, and Merrill Lynch argues in its brief, that the ethics committee "disqualified" Smathers & Thompson from further representation of the Behars. This is a misstatement. The Committee on Professional Ethics was created by the Florida Bar to "guide" its members in "construing the Code of Professional Responsibility." Fla.Bar Integr.R. By-Laws art. X. Upon request of members of the bar, the committee issues opinions concerning ethical problems arising under the Code of Professional Responsibility. These opinions are advisory only and have no binding effect upon a lawyer who chooses to ignore the advice given. If a lawyer does ignore the committee's advice, "he does so not at risk of violating the opinion, because it has no binding effect, but at risk of violating the underlying canon or [disciplinary rule] construed by the opinion." Little & Rush, Resolving the Conflict between Professional Ethics Opinions and Antitrust Laws, 15 Ga.L.Rev. 341, 345 (1981).

> [t]he *Alderson* case involved substantial amounts of discovery, including the deposition of a Merrill Lynch vice president who was an individual defendant early in the litigation. In the course of preparing responses to interrogatories and to document production requests, the Smathers firm . . . was in frequent communication with Merrill Lynch for the purpose of developing the necessary information and documentation both with regard to the actions of the Citrus Associates in August, 1971 and with regard to the Merrill Lynch procedures for handling margin accounts.

The memorandum further noted that in *Merrill Lynch, Pierce, Fenner & Smith* v. *Byrne,* Smathers & Thompson had defended Merrill Lynch against allegations that the brokerage firm had mishandled a customer "stop-order" in violation of the anti-fraud provisions of the Florida blue sky statute and of its duties under the Florida common law of fraud, negligence, and contract.

In opposition to the motion to disqualify, Duncan argued that Merrill Lynch had failed to demonstrate any relationship, much less a "substantial relationship," between Smathers & Thompson's representation of Duncan and its former representation of Merrill Lynch. Duncan described and distinguished from the present suit each of the matters referred to by Merrill Lynch in its affidavit and memorandum. Responding to the cases upon which Merrill Lynch had placed its greatest emphasis, Duncan argued that the *McCormick* case was totally inapposite because it involved events that occurred prior to the Merrill Lynch acquisition of Goodbody & Co., Smathers & Thompson's client in that action, and therefore presented no opportunity for Smathers & Thompson to learn secrets and confidences of Merrill

Lynch. Duncan also presented affidavits of the two opposing counsel in *McCormick* and in *Alderson,* in which each affiant stated that his case involved issues that were unrelated to those raised by the Duncan complaint.

The district court, after hearing oral argument regarding the disqualification question, entered an order granting the motion to disqualify Smathers & Thompson from representing Carl R. Duncan in his action against Merrill Lynch. Relying primarily on the Seventh Circuit opinion in *Westinghouse Electric Corp.* v. *Gulf Oil Corp.,* 588 F.2d 221 (7th Cir. 1978), and on the facts outlined in the Merrill Lynch affidavit, the district court concluded that "[a]lthough the previous cases may not involve the identical issues involved here, the court feels that Smathers & Thompson would certainly have been exposed to information which would be substantially related to the instant case." Because it could not "clearly discern that the issues in the case are unrelated to those previous matters," the court determined that Canons 4 and 9 were implicated and that disqualification was required.

II.

Before addressing the merits of Duncan's appeal, we must determine whether an order granting a motion to disqualify opposing counsel is appealable prior to the entry of a final judgment in the underlying action.

Under 28 U.S.C. § 1291, the federal courts of appeals have jurisdiction to hear "appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." This section, which provides the major avenue of federal appel-

late review,[4] has generally been interpreted as permitting appeal only from a judgment that finally disposes of the action on the merits. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); *Catlin* v. *United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). In *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), however, the Supreme Court recognized that certain "collateral orders" which do not terminate the action on the merits are nevertheless appealable "final decisions" under § 1291. To fall within the *Cohen* exception to the final judgment rule, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468, 98 S.Ct. at 2457.[5] *See Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. ——, ——, 101 S.Ct. 669, 674, 66 L.Ed.2d 571, 579 (1981). Because an order granting a motion to disqualify opposing counsel is not a final judgment, it is appealable only if it satisfied the requirements of the collateral order doctrine announced by *Cohen* and its progeny.

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[4] Although there are a number of statutory provisions authorizing review of interlocutory orders, 28 U.S.C. § 1292; 11 U.S.C. § 47(a); 28 U.S.C. § 1651, none of these exceptions to the final judgment rule embodied in § 1291 is applicable here.

[5] A number of cases from this and other circuits have relied upon language from *Cohen* that only "serious and unsettled question[s]" of law come within the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 547, 69 S.Ct. at 1226. See *In re Corrugated Container Antitrust Litigation,* 611 F.2d 86, 87 (5th Cir. 1980) and cases cited therein. This circuit, however, has not insisted upon the "serious and unsettled question" requirement with respect to interlocutory appeals from rulings on disqualification motions. *See* text accom-

In a long line of cases, this court has held that both orders granting and denying motions to disqualify opposing counsel meet the *Cohen* requirements and therefore are immediately appealable under § 1291. *Musicus* v. *Westinghouse Electric Corp.*, 621 F.2d 742 (5th Cir. 1980) (denial); *Brennan's Inc.* v. *Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979) (grant); *Brown & Williamson Tobacco Corp.* v. *Daniel Int'l Corp.*, 563 F.2d 671 (5th Cir. 1977) (denial); *Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (denial); *Woods* v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976) (grant); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976) (denial); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975) (grant); *Draganescu* v. *First National Bank of Hollywood*, 502 F.2d 550 (5th Cir. 1974), *cert. denied*, 421 U.S. 929, 95 S.Ct. 1655, 44 L.Ed.2d 86 (1975) (grant); *Uniweld Products, Inc.* v. *Union Carbide Corp.*, 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921, 88 S.Ct. 853, 19 L.Ed.2d 980 (1968) (denial); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961) (denial); *see United States* v. *Kitchin*, 592 F.2d 900 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979) (grant); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976) (grant).[6] This term, however, the Supreme

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panying note 6 *infra*. Furthermore, a very recent Supreme Court case discussing the immediate appealability of disqualification denials did not list this requirement as part of its collateral order test. *See Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. ——, ——, 101 S.Ct. 669, 674, 66 L.Ed.2d 571, 579 (1981). Instead, the *Firestone* court utilized the collateral order test set forth in *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468, 98 S.Ct. at 2457, which restated the *Cohen* requirements.

[6] In *North American Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642 (5th Cir.), *cert. denied*, 444 U.S. 956, 100

preme Court has ruled that an order denying a motion to disqualify opposing counsel is not a "final decision" appeal-

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S.Ct. 436, 62 L.Ed.2d 328 (1979), this court held that an order denying a motion to disqualify *class* counsel is not immediately appealable under § 1291. Merrill Lynch argues that under the principles announced in *Arnall*, an order *granting* a motion to disqualify class counsel is also unappealable.

We disagree. In *Arnall* this court determined that the denial of a motion to disqualify class counsel fails to meet two of the *Cohen* collateral order requirements. First, the court reasoned that "because, in a class action, the trial court has the continuing duty to see that the class is adequately represented" and "must constantly scrutinize" the class attorney's performance, the trial court's "initial denial of the disqualification motion may not conclusively determine the disqualification issue." *Id.* at 645. This comment obviously does not hold true with respect to orders *granting* disqualification of class counsel. Disqualification is an extreme remedy that will not be imposed lightly. Once the court satisfies itself that some ethical impropriety exists that requires disqualification, it is not likely to later change its mind on the question or even have an opportunity to do so. Certainly, the court no longer has any duty to "scrutinize" the disqualified attorney. For all practical purposes, therefore, granting a disqualification motion "conclusively determine[s] the disputed question." *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 468, 98 S.Ct. at 2457.

The *Arnall* court also held that the denial of a motion to disqualify class counsel does not meet the requirement that the order "be effectively unreviewable on appeal from a final judgment." *Id.* at 645. Again, we conclude that a different result obtains with respect to orders granting disqualification. When a court grants a disqualification motion, the party (or parties) opposing the motion is abruptly deprived of his chosen counsel and the attorney disqualified is subjected, at least potentially, to loss of both reputation and fees. Postponing review until after final judgment would, in most instances, provide no remedy to the party or his attorney in the event that the disqualification grant is determined to be erroneous. As we discuss below in this opinion, the court reviewing an erroneous grant of a disqualification motion is not likely to vacate the lower court's judgment and order a new trial unless the losing party establishes that he lost because he was wrongfully deprived of his chosen counsel. Few litigants could ever shoulder such a burden. Furthermore, should the party win with his new counsel, the disqualified attorney would have no means of securing

able under § 1291. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. ——, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). While it is clear that *Firestone* has overruled our case law permitting appeals from disqualification denials, that decision

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review of his claim. We hold that, given this potential for irreparable harm, orders granting disqualification would be "effectively unreviewable" absent an immediate appeal. Because an order granting disqualification of class counsel also satisfies the other *Cohen* requirement "that the order resolve an important issue completely separate from the merits of the action," *North American Acceptance Corp.* v. *Arnall, Golden & Gregory, supra*, 593 F.2d at 645 n. 5, such an order is immediately appealable under § 1291.

We are aware that in *Zylstra* v. *Safeway Stores, Inc.*, 578 F.2d 102, 104 & n. 1 (5th Cir. 1978), this court held that where a disqualification question and a class certification question are "inextricably intertwined" so "that the two issues cannot be separately decided," there is no final order under § 1291. *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 469, 98 S.Ct. at 2458. Here, however, the disqualification and class certification questions can "be separately decided": if Merrill Lynch is correct that Smathers & Thompson has confidential information about Merrill Lynch that is relevant to Duncan's suit, the firm should be disqualified from representing either a class or an individual plaintiff. Thus, the ethical consideration raised by the disqualification motion does not depend upon and can be decided totally apart from any class certification question.

In *Arnall* this court, interpreting *Zylstra*, stated in dictum that "[w]henever a district court is aware of possible grounds for disqualifying the class attorney before it makes the certification decision, the disqualification issue will be a part of the certification question." 593 F.2d at 644. This statement was an unnecessary expansion of *Zylstra* and we decline to follow it. Further, we find that even if the statement were binding precedent, it would not preclude our holding that the disqualification order in this case is appealable. *Coopers & Lybrand* held that class certification denials are not appealable under § 1291 because they do not meet the *Cohen* requirements, and it was for this reason that *Zylstra* held that when class certification and disqualification questions are "intertwined" there is no § 1291 appeal. We find, however, that orders granting disqualification do satisfy the collateral order test. Under *Coopers & Lybrand*, therefore, such orders are final decisions even though they occur in the context of a class action.

specifically did not address the appealability of orders *granting* disqualification motions. *Id.* at —— n.8, 101 S.Ct. at 672 n.8, 66 L.Ed.2d at 577. Technically, therefore, *Firestone* leaves intact our precedent[7] regarding the precise issue raised on this appeal. Nevertheless, because of the obvious similarity between the appealability question discussed in *Firestone* and that posed by the present case, we deem it appropriate to reexamine our cases in the light of the Supreme Court's decision.

In *Firestone* the Firestone Tire & Rubber Co. sought to disqualify the plaintiff's counsel on the ground that the counsel occasionally represented Firestone's insurer and, therefore, might be tempted to fashion plaintiff's claims for relief in a way that would minimize the insurer's liability to Firestone. Firestone appealed from the denial of its disqualification motion, arguing that the district court's order was a "final decision" under the *Cohen* collateral order doctrine. Sitting en banc, the Eighth Circuit overruled its prior decisions and held that an order denying a motion to disqualify counsel is not an appealable final order.

Applying the *Cohen* requirements, the Supreme Court agreed with the Eighth Circuit that a disqualification denial is not immediately appealable under § 1291.[8] The Court

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[7] Although prior to *Firestone* the circuits had split on the question of the appealability of disqualification denials, every circuit to have considered the question had held that orders granting disqualification motions are appealable under § 1291. See, e. g., *Armstrong* v. *McAlphin*, 625 F.2d 433 at 440-41 (2nd Cir. 1980), vacated on other grounds, —— U.S. ——, 101 S.Ct. 911, 66 L.Ed. 2d 835 (1981). *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377, 378 (8th Cir. 1980), vacated sub nom. *Firestone Tire & Rubber Co.* v. *Risjord*, 446 U.S. ——, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981); *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265, 266-67 (6th Cir. 1979).

[8] After finding disqualification denials to be nonappealable, the Eighth Circuit held that its ruling was prospective only and pro-

held that an order denying disqualification meets the *Cohen* requirement that the order "conclusively determine the disputed question," and the Court assumed without deciding that such an order "resolve[s] an important issue completely separate from the merits of the action." [9] The Court concluded, however, that Firestone had made no showing that a disqualification denial is "effectively unreviewable on appeal from a final judgment." An order is "effectively unreviewable" only "'where denial of immediate review would render impossible any review whatsoever'" or, stated otherwise, where the order involves "'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Firestone Tire & Rubber Co., supra,* 449 U.S. at ——, 101 S.Ct. at 675, 66 L.Ed.2d at 580. Noting that the denial of a disqualification motion will normally be difficult to assess until after the litigation has ended, the Court reasoned that such an order "will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits." *Id.* The Court concluded that the appellate court's power to vacate and order a new trial was a "plainly adequate" remedy in the event of an erroneous denial of a disqualification motion.

Merrill Lynch maintains that the *Firestone* rule that disqualification denials are not immediately appealable under § 1291 is equally applicable to disqualification grants. We

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ceeded to the merits of the appeal. Noting that the finality requirement is jurisdictional in nature, the Supreme Court held that the lower court was without jurisdiction to hear the appeal and vacated its opinion.

[9] We hold that an order granting a motion to disqualify counsel does "resolve an important issue completely separate from the merits of the action." *Cf. North American Acceptance Corp.* v. *Arnall, Golden & Gregory, supra,* 593 F.2d at 645 n. 5.

disagree. First, the Court's statement that "[t]he propriety of the District Court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment," *Firestone Tire & Rubber Co.* v. *Risjord, supra* at ——, 101 S.Ct. at 675, 66 L.Ed.2d at 580, does not hold true with respect to disqualification grants. When a district court grants disqualification, the effect of the court's action is immediate and measurable. The party opposing the motion is abruptly deprived of his counsel, and, provided he desires to proceed with his action, the litigation is disrupted while he secures new counsel. In this situation, the reviewing court need not wait until final judgment to evaluate the impact of the lower court's order.

In addition, the appellate court's power to vacate the judgment appealed from and order a new trial would seldom provide any solace to the party erroneously deprived of his chosen counsel. As the Second Circuit recently observed, "[i]f the order [granting disqualification] is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden." *Armstrong* v. *McAlpin*, 625 F.2d 433, 440-41 (2d Cir. 1980), *vacated on other grounds*, —— U.S. ——, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981). Furthermore, if the party who suffers the erroneous grant of a disqualification motion prevails in the action, the disqualified counsel is not likely to find any remedy for the damage to his reputation or to his pocketbook. Thus, unlike the situation in *Firestone*, the harm caused by postponing review of an order granting disqualication of counsel would in most instances be irreparable.

We conclude that an order granting a motion to disqualify counsel is, as a practical matter, "effectively unreviewable" on appeal from a final judgment on the merits. Such an order, therefore, falls within the narrow exception to the final judgment rule announced in *Cohen* and subsequent cases. Finding that we have jurisdiction to hear this appeal, we now proceed to a consideration of the merits of Duncan's claim.

III.

A. *Canon 4*

Whenever an attorney seeks to represent an interest adverse to that of a former client, the possibility arises that the attorney, whether intentionally or inadvertently, will reveal to his present client confidential information entrusted to him during his previous representation. Disclosure of such confidential information runs afoul of the attorney's ethical obligation to "preserve the confidences and secrets of a client," ABA Code, Canon 4, and threatens the very foundation of the attorney-client relationship. Should a court determine that the sanctity of information previously given in confidence is indeed in jeopardy, it will disqualify the attorney from opposing his former client. The justifications for imposing such a drastic remedy are clear. First, it would be grossly unfair to permit an attorney to reveal confidences of his former client to the client's adversary. Second, the policy of encouraging communication between client and attorney would be frustrated if the public perceived that attorneys were free to divulge information previously given in confidence. Further, the integrity of the judicial system would be sullied if courts tolerated such abuses by those who profess and owe undivided loyalty to their clients.

Although rigidly enforcing the ethical obligation of confidentiality, the courts have seen no need to fashion a rule that prevents an attorney from ever representing an interest adverse to that of a former client. Thus, to disqualify his former counsel, the moving party must prove not only the existence of prior attorney-client relationship but also that there is a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. The party seeking disqualification is not required, however, to point to specific confidences revealed to his former attorney that are relevant to the pending case. Instead, he "need only to show that the matters embraced within the pending suit are *substantially related* to the matters or cause of action wherein the attorney previously represented him." *Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.* 559 F.2d 250, 252 (5th Cir. 1977); *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 89 (5th Cir. 1976); *T. C. Theatre Corp.* v. *Warner Bros. Pictures,* 113 F.Supp. 265, 268 (S.D.N.Y. 1953). Once the former client proves that the subject matters of the present and prior representations are "substantially related," the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation. *Id.*

We find that the district court, though purporting to apply the substantial relationship test, strayed from the legal principles announced in our disqualification cases. As we have indicated, the party seeking disqualification of his former counsel must bear the burden of proving that the present and prior representations are substantially related. In this case the district court appears to have relieved Merrill Lynch of this burden. In discussing the substantial relationship test, the court quoted from the

Seventh Circuit's opinion in *Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978):

> [O]nly where it is clearly discernible 'that the issues involved in a current case *do not relate* to matters in which the attorney formerly represented the adverse party will the attorney's present representation be treated as measuring up to the standard of legal ethics.'

Id. at 224 (emphasis added). On the basis of this authority, the district court concluded "that the court cannot clearly discern that the issues in this case are *unrelated* to those previous matters." Emphasis added. In addition, the court stated that "[a]lthough the previous cases may not involve the identical issues involved here, the court feels that Smathers & Thompson would certainly have been exposed to information which would be substantially related to the instant case."

These statements, and others in a similar vein, evidence a misunderstanding of the applicable legal principles. Instead of requiring Merrill Lynch to prove that the present and former representations were substantially related, the court assigned Duncan the task of proving that the two representations were *not* substantially related. The court not only removed the burden of proof from Merrill Lynch but saddled Duncan with the burden of proving a negative. This interpretation of *Westinghouse* simply does not accord with the Fifth Circuit rule on where the burden of proof lies in a disqualification proceeding. We, therefore, have no course but to remand to the district court with instructions that it apply the legal principles announced in this opinion.

Furthermore, even if the district court had properly allocated the burden of proof, we find that this record pre-

sents insufficient evidence to establish the requisite "substantial relationship." In support of its motion to disqualify, Merrill Lynch listed ten matters in which Smathers & Thompson had represented it but said nothing about the specific nature of these cases.[10] Instead Merrill Lynch stated generally that these matters involved various kinds of securities, margin accounts, Merrill Lynch's relationship with its customers and employees, and the federal and state securities laws. In addition, Merrill Lynch stated that in performing its work Smathers & Thompson had reviewed Merrill Lynch's records, held conferences with its officers and employees, and had prepared a range of legal documents on behalf of its client. Duncan has not claimed, and considering the nature of a securities practice probably could never claim, that its representation of Merrill Lynch did not involve such matters. However, Duncan argues, and we agree, that a catalogue of such generalities offers little assistance to a court attempting to ferret out the degree of similarity, if any, between the former representation and the pending case.

In a disqualification case, the focus of the district court's inquiry should be on the precise nature of the relationship between the present and former representations. As this court recently observed "'[w]hen dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.'" *Brennan's, Inc.* v. *Brennan's Restaurants, Inc., supra,* 590

[10] Merrill Lynch did make some additional comments about two of these cases. As we discuss below, however, these comments offered little beyond the general statement made with respect to all ten of the matters comprising Smathers & Thompson's previous representation of Merrill Lynch.

F.2d at 173-74 (quoting *United States* v. *Standard Oil Co.*, 136 F.Supp. 345, 367 (S.D.N.Y. 1955). Merely stating that the previous representation involved securities work, conferences with Merrill Lynch employees, and the preparation of various legal documents provides the district court with no opportunity to engage in a "painstaking analysis of the facts." The statements offered by Merrill Lynch, and accepted by the district court as evidence of a substantial relationship, could be applied to virtually any law firm that had ever represented Merrill Lynch or any large brokerage firm. However, the fact that Smathers & Thompson used to represent Merrill Lynch, even on a variety of matters and over a relatively long period of time, is alone insufficient to establish the required nexus with the present case. "The rule of disqualification is not mechanically applied in this Circuit." *Church of Scientology* v. *McLean*, 615 F.2d 691, 693 (5th Cir. 1980). Only when the moving party delineates with specificity the subject matters, issues, and causes of action presented in former representation can the district court determine if the substantial relationship test has been met. Merely pointing to a superficial resemblance between the present and prior representations will not substitute for the careful comparison demanded by our cases. In sum, we find that Merrill Lynch failed to provide the district court with sufficient information to enable it to measure the substantiality of the relationship between Duncan's suit and the prior matters wherein Smathers & Thompson represented Merrill Lynch.

In reaching our conclusion, we are mindful that in its memorandum Merrill Lynch did offer some further discussion of two of the ten matters listed in the affidavit, and that Merrill Lynch did identify one other case that supposedly involved issues "remarkably similar" to those pre-

sented in Duncan's suit. We find, however, that Merrill Lynch's discussion of these cases falls short of establishing a substantial relationship with the pending suit. The first case, *Alderson* v. *Citrus Associates,* arose from the events following a suspension of orange juice futures contracts on the New York Cotton Exchange as a result of price controls imposed by the Nixon administration. Alderson, who had maintained a margin account with Merrill Lynch, sued its broker alleging violations of federal and state securities laws. Merrill Lynch stated that, in handling this case, Smathers & Thompson "was in frequent communication with Merrill Lynch for the purpose of developing the necessary information and documentation . . . with regard to Merrill Lynch procedures for handling margin accounts." In the second case, *Merrill Lynch, Pierce, Fenner & Smith* v. *Byrne,* a Merrill Lynch customer charged that Merrill Lynch had mishandled the customer's stop-order in violation of the Florida securities laws and in violation of its duties under the common law of fraud, negligence, and contract. Merrill Lynch stated that Smathers & Thompson's representation in this case included pre-trial discovery, motion practice, and an appeal to the Florida Supreme Court.

It is apparent that Merrill Lynch's comments regarding these cases are essentially a paraphrase of the general observations made about all ten of the cases comprising Smathers & Thompson's former representation of Merrill Lynch. For example, Merrill Lynch again points out that these cases involved causes of action arising under federal and state securities laws, but it makes no attempt to describe the precise issues involved in those cases or to relate those issues to the questions raised in Duncan's suit. Similarly, Merrill Lynch states that *Alderson* pertained to "Merrill Lynch procedures for handling margin accounts,"

but it does not explain how the margin account question raised in that case relates to the margin account question presented in the present case. The discussion of these cases, therefore, contains the same flaw as before: Merrill Lynch has described only a general, superficial connection between the subject matters of these cases and that of Duncan's suit. Again, we are left to guess the precise nature of the relationship between the pending and former representation. A more careful comparison is required, however, before disqualification will be granted.

Merrill Lynch also claims that a substantial relationship is demonstrated by the facts and issues presented in *McCormick* v. *Esposito,* 500 F.2d 620 (5th Cir. 1974), *cert. denied,* 420 U.S. 912, 95 S.Ct. 834, 42 L.Ed.2d 842 (1975).[11] In that case McCormick filed suit against the securities brokerage firm of Goodbody & Co. alleging violations of Regulation T and of the New York Stock Exchange Rules relating to maintenance margin requirements. In particular, McCormick alleged that Goodbody & Co. had utilized "buying power" generated in his Special Miscellaneous Account to make extensions of credit not permitted by Regulation T, a claim that closely resembles an allegation raised in Duncan's complaint. Merrill Lynch points out that Goodbody & Co. was acquired by a wholly owned subsidiary of Merrill Lynch in December 1970, some six months before McCormick brought this action. Merrill Lynch retained Smathers & Thompson to represent Goodbody & Co. in *McCormick,* and, according to Merrill Lynch,

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[11] In the affidavit accompanying the disqualification motion, the extended discussion of the factual background of the *McCormick* case stands in sharp relief to the generalities offered with respect to the ten matters comprising Smathers & Thompson's former representation of Merrill Lynch.

its attorneys directed and approved the actions taken by Smathers & Thompson during this litigation. Merrill Lynch was not a party to this action, however.

While we agree that there are important similarities between the subject matters of *McCormick* and the present suit, we cannot accept Merrill Lynch's argument that, with *McCormick*, it has met its burden of proving a substantial relationship. Merrill Lynch is correct that McCormick did not bring his action until after Goodbody & Co. had been acquired by a Merrill Lynch subsidiary. Merrill Lynch neglects to note, however, that McCormick's suit pertained to acts and events that occurred in 1968 and 1969, *more than a year before Merrill Lynch or its subsidiary had any connection with Goodbody & Co.* The allegations of McCormick's complaint, therefore, had nothing whatsoever to do with Merrill Lynch or its subsidiary and, consequently, gave Merrill Lynch no occasion to reveal any secrets or confidences other than those related to Goodbody & Co. during the years 1968 and 1969. Under these circumstances, it is simply not reasonable to irrebuttably presume that Smathers & Thompson, though employed by Merrill Lynch, had access to Merrill Lynch's confidences and secrets. Although defending the *McCormick* action required Smathers & Thompson to familiarize itself with Goodbody & Co.'s procedures relating to Special Miscellaneous Accounts and margin accounts, the firm had no reason, and probably no opportunity, to acquire any information about Merrill Lynch. Of course, it is possible that, by some unusual circumstance, Smathers & Thompson did have access to information other than that necessary to its defense of Goodbody & Co. We conclude, however, that Merrill Lynch is not entitled to a conclusive presumption on this question but must present evidence that Smathers & Thompson had

access to other information and that such information is relevant to the issues raised in the pending case.

Finally, we find distinguishable two cases heavily relied upon by Merrill Lynch. First, Merrill Lynch cites *Westinghouse Elec. Corp.* v. *Gulf Oil Corp., supra,* 588 F.2d at 224, for the proposition that the substantial relationship test "does not necessarily involve any inquiry into the impenderables involved in the degree of the relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in one matter which will be harmful to the client in the other." While we do not necessarily disagree with the Seventh Circuit's language on this point, we fail to see how it aids Merrill Lynch's position in the present case.

In *Westinghouse,* Westinghouse brought an antitrust action against United Nuclear Corp. (UNC) and Gulf Oil Corp. (Gulf) alleging that defendants and others had fixed the price of uranium. After suit was filed, Gulf sought to disqualify the law firm representing UNC on the ground that the firm had previously represented Gulf on matters substantially related to the pending suit. Gulf established that during a five-year period of representation the firm had handled numerous real estate transactions relating to Gulf uranium properties. Realizing that the subject matters of real estate transactions and the litigation surrounding an alleged price-fixing conspiracy were facially dissimilar, Gulf went on to delineate the types of confidential information that it had entrusted to its former counsel, viz, information relating to the quantity and quality of its uranium reserves and to its reasons for delaying production of those reserves. The court of appeals, reversing the trial court, held that Gulf had proven that the subject matters of the pending and prior representations were substantially related.

We find that both the result and the analysis used in *Westinghouse* are consistent with our interpretation of the substantial relationship test. As we have indicated in ruling on a disqualification motion a court must look behind mere facial similarities or dissimilarities between the prior and pending cases and focus on the precise nature of the subject matters presented in the two representations. In *Westinghouse* Gulf enabled the court to make this comparison by specifying the kinds of confidential information that it had revealed to its former counsel and by describing how that information related to the matters raised in the *Westinghouse* suit. Gulf's detailed description of the scope of the prior legal representation stands in sharp contrast to the generalities offered by Merrill Lynch in the present case. In short, although Merrill Lynch has repeatedly asserted that the present and former representations are substantially related, it has demonstrated no more than a surface and superficial connection between the matters. Citing *Westinghouse* does not help Merrill Lynch but merely illustrates what Merrill Lynch should have done but did not do.

Merrill Lynch next cites *Fund of Funds, Ltd.* v. *Arthur Anderson & Co.*, 567 F.2d 225, 236 (2d Cir. 1977), for the proposition that because Smathers & Thompson was privy to Merrill Lynch's internal "practices and procedures," it should be disqualified from opposing its former client in this action or, apparently, in any future action. In that case a law firm representing Fund of Funds was disqualified from suing Arthur Anderson because the firm was determined to be merely an "extension" of the law firm that had been general counsel to Anderson for some 15 years and that had specific knowledge of the practices and procedures that were the subject of Fund of Funds' suit. There are important differences between *Fund of Funds* and the present suit, however. There, the question was not whether

Anderson's counsel, Morgan Lewis & Bockius, had knowledge of its practices and procedures but whether another firm, alleged to be Morgan Lewis' "understudy," had access to that knowledge. There is no evidence that Morgan Lewis ever seriously argued that *it* did not possess such relevant confidential information. Even if it had made this argument, the facts were clear not only that Morgan Lewis had a long-standing and intimate knowledge of every facet of Anderson's business, but also that Morgan Lewis had actually sorted out documents that suggested Anderson's liability to the plaintiff.

In the present case, of course, Smathers & Thompson has denied that it possesses any confidential information relevant to Duncan's action, and it has presented evidence in support of its claim. First, Smathers & Thompson points out that, unlike Morgan Lewis, it has never been general counsel to its former client but instead has represented Merrill Lynch in a limted number of local matters and only for the duration of each matter. Thus, it has not had the same pervasive, day-to-day relationship with its client that was present in *Fund of Funds*. Second, although Smathers & Thompson concedes that it learned confidential information while representing Merrill Lynch, it argues that these confidences pertained only to the matters then at hand. Finally, Smathers & Thompson maintains that Merrill Lynch has failed to establish that any of these matters are substantially related to the instant case. These arguments are convincing. Merrill Lynch cannot have Smathers & Thompson disqualified simply by stating that the firm has knowledge of Merrill Lynch's "practices and procedures." Instead, it must prove that Smathers & Thompson has knowledge of the particular practices and procedures which are the subject matter of Duncan's suit. It can do this

either by establishing that the present and previous representations are substantially related or by pointing to specific instances where it revealed relevant confidential information regarding its practices and procedures. Merrill Lynch has failed to do either.

We hold that, on this record, Merrill Lynch has failed to demonstrate the requisite similarity between the prior representations and the present suit. Until it does so, Merrill Lynch is not entitled to the inference that Smathers & Thompson possesses confidential information that is relevant to Duncan's action.

B. *Canon 9*

In the disqualification motion filed with the district court, Merrill Lynch argued that Smathers & Thompson's representation of Duncan was also barred by the proscription that "[a] lawyer should avoid even the appearance of impropriety." Canon 9, ABA Code. The district court, however, gave no discussion of Canon 9 in its disqualification order, other than stating that "the court is mindful of Canon 9 which prohibits even the appearance of impropriety." This statement provides us with no basis for determining whether or for what reason the court felt that Smathers & Thompson's representation of Duncan was prohibited by Canon 9.

In its brief Merrill Lynch refers to this Circuit's two-part test for determining when an attorney should be disqualified for an appearance of impropriety: (1) the trial court must find some "specifically identifiable appearance of improper conduct" and (2) the court must "find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case." *Woods* v. *Covington County Bank*,

537 F.2d 804, 812 and 813 n.12 (5th Cir. 1976). Merrill Lynch then argues that this test is met here for two reasons. First, it argues an actual impropriety resulted when Smathers & Thompson violated Canon 4 by taking a case against Merrill Lynch which was substantially related to the firm's former representation of Merrill Lynch. We have held, however, that Merrill Lynch has yet to establish a violation of Canon 4 in this case. Because no impropriety has been proved, a Canon 9 violation cannot be premised on this ground. Second, Merrill Lynch asserts that an appearance of impropriety was created when, in 1977, Smathers & Thompson sought to represent Sami and Matilde Behar in their suit against Merrill Lynch at the same time the firm was still representing Merrill Lynch. As we discussed in footnote[12] above, however, the *Behar* matter has nothing to do with the present suit, and, furthermore, any appearance of impropriety presented by the case was purged when Smathers & Thompson withdrew as counsel for the Behars. Thus, neither of the grounds listed by Merrill Lynch in its brief meets even the first prong of the *Woods* test.

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[12] *See* note 3 *supra*. Merrill Lynch argued below that two members of Smathers & Thompson had accounts with Merrill Lynch and therefore would be members of the purported class. Smathers & Thompson denied that any of its members would be class members. In *Zylstra* v. *Safeway Stores, supra*, 578 F.2d at 104, this court held that "attorneys . . . who themselves are members of the class of plaintiffs should be subject to a per se rule of disqualification under Canon 9 and should not be permitted to serve as counsel for the class." *Zylstra* cannot be applied in this point because the district court has made no factual determination as to whether Smathers & Thompson attorneys are indeed members of the class. Furthermore, because the court granted Merrill Lynch's motion to stay the action until its motion to disqualify was determined, the court has yet to give any consideration to the class certification question. Of course, *Zylstra* would not prevent Smathers & Thompson from representing Duncan in his individual action.

IV.

We conclude that the district court erred in disqualifying Smathers & Thompson from representing Duncan in his action against Merrill Lynch. On remand, the court should, in accordance with the principles we have outlined, require Merrill Lynch to bear the burden of proving that Smathers & Thompson's current representation of Duncan is substantially related to the firm's former representation of Merrill Lynch. In applying the substantial relationship test, the court should require Merrill Lynch to delineate with greater specificity the scope of the prior representation and to demonstrate precisely how the subject matters of the prior representation are connected with the matters embraced within the pending suit. Should the court then determine that disqualification is warranted, it should enter detailed findings of fact which set forth the bases for its conclusion.

We vacate the district court's order and remand for further proceedings.

VACATED and REMANDED.

Judgment of the Court of Appeals

No. 79-3112

D.C. Docket No. 78-5284-CIV-NCR

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CARL R. DUNCAN, on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BEFORE:

GODBOLD, *Chief Judge,* MORGAN and HENDERSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby

vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that the defendant-appellee pay to the plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

Dated: June 1, 1981

APPENDIX B

Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No. 78-5284-Civ-NCR

CARL R. DUNCAN, on behalf of himself and all others similarly situated

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

ORDER

THIS CAUSE is before the court on motion by defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc. to disqualify the law firm of Smathers & Thompson as counsel for plaintiff. Defendant asserts that due to previous representations of Merrill Lynch by the firm of Smathers & Thompson, the Smathers firm is in violation of Canon 4 and 9 of the A.B.A. Code of Responsibility.

The applicable law regarding attorney disqualifications is described by the Fifth Circuit as "fairly straightforward." *Wilson P. Abraham Construction Corporation* v. *Armco Steel Corporation,* 559 F.2d 250, 252 (5th Cir. 1977). It has been asserted correctly by defendant/movant and conceded by plaintiff/opponent. It is as follows:

> [A] former client seeking to disqualify an attorney who appears on behalf of his adversary, need only to

> show that the matters embraced within the pending suit are *substantially related* to the matters or cause of action wherein the attorney previously represented him.

Id. citing *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83 (5th Cir. 1976); *T. C. Theatre Corp.* v. *Warner Bros. Pictures,* 113 F. Supp. 265 (S.D.N.Y. 1953).

Once the substantial relationships between the previous case and the pending case has been shown, the law presumes that "confidences potentially damaging to the client have been disclosed to the attorney during the former period of representation." *Armco Steel,* supra at 252. At that point, the court will not inquire to see if the information disclosed is damaging or if the attorney even plans to utilize it. "Then, where 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation . . . it is the court's duty to order the attorney disqualified." *Emile Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562, 571 (2d Cir. 1973).

The determinative issue, therefore, is a direct one. Did Smathers & Thompson's prior representations of Merrill Lynch involve issues *substantially related* to the matters in the above styled cause? If so, then the presumption arises that confidential information was passed, requiring the conclusion that Smathers & Thompson be disqualified.

The complaint in the instant case, brought on behalf of an alleged class of plaintiffs, basically alleges that defendant induced plaintiff to purchase municipal bonds at a price above the market price; that Merrill Lynch obtained the bonds at a price below that charged to Duncan, and that Merrill Lynch represented that no commission would be

charged on the transaction. Plaintiff also alleges that defendant fraudulently manipulated "buying power" in customers' margin accounts, and that Merrill Lynch charged usurious interest rates.

It appears from an affidavit filed by Daniel A. Dolan, Vice President of Merrill Lynch and manager of its litigation department, that over the last 10 years Smathers & Thompson has represented Merrill Lynch in 10 assorted state and federal cases. Dolan contends that the cases "involved stocks, commodities, municipal and government securities, margin accounts, Merrill Lynch's relationships with its customers, etc." The affidavit further claims that Smathers & Thompson has conducted extensive investigations into the records of Merrill Lynch, interviewed its employees and done other preparatory research which would ultimately familiarize Smathers & Thompson with the internal procedures and policies of Merrill Lynch.

Not surprisingly, Smathers & Thompson denies that this case in any respects is substantially related to the other cases, and urges this court to deny the motion. Each prior case is described and distinguished from the instant one in the verified memorandum of law filed by James W. Crabtree of Smathers & Thompson.

The most recent and extensive examination of the substantial relationship test can be found in *Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978). In that opinion the Seventh Circuit describes the test as encompassing those considerations found in Canon 4 and 9. Basically that "a lawyer should preserve the confidences and secrets of a client" and that "a lawyer should avoid even the appearance of professional impropriety." *Id.* at 224. It then describes the court's inquiry as one into the

> possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other.
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>
> the substantial relationship test [requires that] evidence need only establish the scope of the legal representation and not the actual receipt of the allegedly relevant confidential information. Then only where it is clearly discernible, "that the issues involved in a current case do not relate to matters in which the attorney formerly represented the adverse party will the attorney's present representation be treated as measuring up to the standards of legal ethics.

Id.

Considering the matters presented in the record in light of this language, the court is of the opinion that Smathers & Thompson must be disqualified. According to this court's reading of *Westinghouse,* disqualification appears necessary because of the many communications which invariably passed from Merrill Lynch to Smathers & Thompson in the course of that relationship. Although the previous cases may not involve the identical issues involved here, the court feels that Smathers & Thompson would certainly have been exposed to information which would be substantially related to the instant case. It seems clear that a law firm that is privy to a client's procedures and policies,

and is able to examine internal memoranda as well as interview witnesses, is certainly given an opportunity to benefit from any privileged information so gathered in a subsequent law suit against that client. *See Fund of Funds, Ltd.* v. *Arthur Anderson & Co.*, 567 F.2d 225 (2d Cir. 1977). It is likewise clear that there is a "possibility" that confidences were disclosed, and that the court cannot clearly discern that the issues in this case are unrelated to those previous matters. *Westinghouse, supra.* A finding that the substantial relationship test has been met is supported in light of the defendant's industry and the allegations in the complaint. The previous cases may be termed as "garden variety" securities cases. But, if while representing Merrill Lynch in those cases, Smathers & Thompson became aware of company procedures or practices that would aid a future client against the former client, certainly Canons 4 and 9 would be violated. This is particularly true where the complaint against the former client alleges conduct that would have to have been pervasive and consistent enough to injure an entire class of plaintiffs. Certainly Smathers & Thompson would have learned things during the course of representation which would aid them unfairly in the prosecution of their action.

Finally, the court is mindful of Canon 9 which prohibits even the appearance of impropriety.

> If [the lawyer-client] relationship is to be an effective one, it must exist in an atmosphere of complete and open communication. If a client conducts legal affairs in a guarded and restrained manner out of fear that even the most innocuous statement to counsel may come to haunt him at a later date, our legal system will suffer.

Florida Realty Inc. v. *General Development Corp.*, 459 F. Supp. 781, 784 (S.D. Fla. 1978). This consideration forces the court to conclude that Smathers & Thompson cannot prosecute this action against its former client.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the motion to disqualify the law firm of Smathers & Thompson from representing Carl R. Duncan in this lawsuit is granted.

DONE AND ORDERED this 28th day of July, 1979.

/s/ NORMAN C. ROETTGER, JR.
United States District Court Judge

APPENDIX C

Respondent's Class Action Complaint, As Amended

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-5284-Civ-CA

CARL R. DUNCAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant.

AMENDED COMPLAINT—CLASS ACTION

CARL R. DUNCAN ("DUNCAN") sues MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. ("MERRILL LYNCH") on behalf of himself and all others similarly situated and says:

1. Plaintiff is a citizen of the State of Florida residing in Dade County, Florida. Defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., is a Delaware corporation maintaining its principal place of business in New York City, New York.

2. This action arises under the Securities Act of 1933, 15 U.S.C.A. § 77a, *et sequitur*; the Securities Exchange Act of 1934; and Chapter 517, Fla. Stat.

Appendix C—Respondent's Class Action Complaint

Class Action Allegations

The following class action allegations are made in accordance with Rule 19 of the Local Rules of the Southern District of Florida.

A. This action is properly maintainable as the prerequisites to its maintenance under Rule 23(a) exist, and it is maintainable under Rule 23(b)(3).

B. There are two classes, with the first class being composed of four subclasses. The classes are defined as follows:

1. All customers of MERRILL LYNCH who purchased securities or bonds from or sold them to MERRILL LYNCH during the appropriate period of limitations where:

a. MERRILL LYNCH acted as a principal and/or

b. MERRILL LYNCH utilized non-transaction appreciation in the customers' Special Miscellaneous Accounts to reduce the amount of cash necessary for purchases in cash accounts in violation of Regulation T.

The subclasses involved as to Class 1 are defined as follows:

Subclass (A) is composed of all persons who purchased bonds from or through MERRILL LYNCH or sold bonds to or through MERRILL LYNCH, during the appropriate period of limitations, where MERRILL LYNCH acted as a principal.

Subclass (B) consists of all persons who purchased municipal bonds by or through MERRILL LYNCH or sold municipal bonds to or through MERRILL LYNCH through the appropriate period of limitations, where MERRILL LYNCH acted as a principal.

Subclass (C) includes all persons who maintained margin accounts with MERRILL LYNCH, during the appropriate

period of limitations, in which "buying power" was created by price appreciation unrelated to transactions in the customer account.

Subclass (D) is composed of all persons who have maintained margin and cash accounts with MERRILL LYNCH, during the appropriate period of limitations, where "buying power" created in their margin account was transferred to their cash account to reduce the amount of cash necessary for purchases effected in the cash account.

2. Class 2 is defined as all Florida customers of MERRILL LYNCH who have maintained margin accounts with MERRILL LYNCH where MERRILL LYNCH has charged or otherwise extracted interest from those customers at rates which exceeded the usury limits prescribed by Florida law.

Pending discovery, it is only possible to estimate that each class and each subclass are so numerous as to make joinder impracticable.

C. Plaintiff claims to be an adequate representative of each class and each subclass involved as Plaintiff has maintained both a margin and cash account with MERRILL LYNCH and has effected transactions in both his cash and margin accounts, including purchases in the cash account of municipal bonds which resulted in "buying power" being credited to the cash account from the margin account for the purchase of municipal bonds. Plaintiff has been charged usurious interest by MERRILL LYNCH, and MERRILL LYNCH has extracted usurious interest from Plaintiff. Plaintiff's counsel is experienced in both class and securities actions.

D. The questions of law and fact claimed to be common to each of the subclasses include:

Appendix C—Respondent's Class Action Complaint

1. *Common Questions of Fact.*

a. MERRILL LYNCH has in the past, and will continue unless restrained from so doing in the future, effected purchases and sales of bonds for its customers by employing manipulative devices, including but not limited to, acting as an undisclosed principal, selling bonds to customers from MERRILL LYNCH inventory without disclosing to the customer that such bonds were available from other sources at less than that charged by MERRILL LYNCH, obtaining firm commitments from customers for the purchase of bonds at a price certain and then going into the marketplace to purchase such bonds at a lesser price resulting in a profit to MERRILL LYNCH and an increased price to the customer, buying bonds from customers at a price below that which the customer could obtain in other markets without advising the customer of such opportunity, and failing to advise the customer that mark-up or commission was generated or profit made on such transactions.

b. In connection with the sale of securities and bonds to customers in a cash account, MERRILL LYNCH has, and will unless restrained from so doing, employed "buying power" which was generated in customers' margin accounts as a consequence of price appreciation to reduce the amount of money necessary from the customer.

c. MERRILL LYNCH has in the past, and will continue unless restrained from so doing in the future, charged and extracted interest from its Florida customers at rates which exceed the usury limits prescribed by Florida law.

2. *Common Questions of Law.*

a. Whether MERRILL LYNCH's practices as a principal in connection with the sale and purchase of bonds is a manipulative device prohibited by the securities laws.

b. Whether MERRILL LYNCH's utilization of "buying power" (a euphemism for appreciation in a Special Miscellaneous Account) is a manipulative device prohibited by Regulation T and the securities laws.

c. Whether MERRILL LYNCH's practices concerning charging interest and extracting interest from Florida customers violates the usury laws of the State of Florida.

E. There should not be any questions affecting only individual members of the class which could predominate over common questions of law or fact. Most members of the class will probably have suffered a low level of damages such that individual prosecution of separate actions by individual members of the class would not be economic; indeed, it does not appear that there is any litigation pending concerning the controversy herein defined. It would appear desirable to concentrate the litigation of all these claims in one forum. Management of the defined subclasses will not be difficult as, while there may and will be some overlap as between members of the various subclasses, the identity of those to be included in each subclass may be readily ascertained from the records of MERRILL LYNCH and the liability as to each member of each subclass may be likewise ascertained from the records of MERRILL LYNCH.

Count I

1. On or about July, 1978, DUNCAN opened a margin account with MERRILL LYNCH in connection with the sale short of 1,000 shares of Sea Containers stock. Thereafter, and through October, 1978, MERRILL LYNCH variously solicited DUNCAN to purchase municipal bonds including those bonds issued by the Municipal Assistance Corporation of New York.

2. On or about October 17, 1978, DUNCAN was solicited by MERRILL LYNCH and did order, upon the recommendation as suitable by MERRILL LYNCH, Municipal Assistance Corporation bonds.

3. MERRILL LYNCH recommended to DUNCAN that he purchase bonds at a price of $110.00 for a total of $110,000.00 plus then accrued interest, which MERRILL LYNCH estimated to be approximately $2,000.00.

4. MERRILL LYNCH represented to DUNCAN that no commissions would be charged to DUNCAN. MERRILL LYNCH omitted to inform DUNCAN that MERRILL LYNCH would act as a principal in the transaction and further failed to inform DUNCAN that the price to be ultimately charged DUNCAN by MERRILL LYNCH exceeded the fair market price of the bonds on the day of their purchase, and further failed to inform DUNCAN that MERRILL LYNCH could have obtained the bonds for DUNCAN at a price below that ultimately charged DUNCAN.

5. Following the purchase of the bonds by MERRILL LYNCH for DUNCAN, MERRILL LYNCH prepared and sent to DUNCAN a "Funds or Securities Due" notice, indicating that there was due to MERRILL LYNCH the amount of $112,640.94. The "Funds or Securities Due" notice failed to state the purchase price of said bonds and was deceptive in that MERRILL LYNCH intended to and ultimately did charge DUNCAN $112.00 for the bonds as opposed to $110.00, for a total charge to DUNCAN of $114,106.94.

6. The Municipal Assistance Corporation bonds were purchased in a cash account. The "Funds or Securities Due" notice was deceptively false in that the notice re-

flected an amount due from DUNCAN for the said purchase of Municipal Assistance Corporation bonds which was arrived at by crediting to DUNCAN's cash account "buying power" which was "generated" in his margin account as a consequence of a reduction in price of the Sea Containers stock which DUNCAN had sold short in July, 1978, all without DUNCAN's knowledge or consent.

7. Upon discovery by DUNCAN of the actual price charged him for said bonds, he immediately notified MERRILL LYNCH that he did not order bonds at 112 and demanded that MERRILL LYNCH rescind the transaction. MERRILL LYNCH agreed to rescind the transaction immediately but failed to do so.

8. MERRILL LYNCH thereafter, in spite of the express promise to reverse the transaction, purchased the bonds from DUNCAN for their own account at a price of 109½, which price was lower than that which was available to DUNCAN in the general marketplace for said bonds on the date and time of such sale.

9. At no time did MERRILL LYNCH advise DUNCAN of any mark-up or commission charge, and the confirmation slips of sale sent to DUNCAN indicate that no mark-up or commission was charged.

10. As heretofore alleged, in connection with the offer and sale to DUNCAN of the Municipal Assistance Corporation bonds, MERRILL LYNCH made untrue statements of material fact and omitted to state material facts necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, Plaintiff not knowing of such untruths or omissions.

11. In making the offer and sale of the municipal bonds to Plaintiff, MERRILL LYNCH used means and instruments of transportation and communication and made use of the mails, directly and indirectly employed devices, schemes and artifices to defraud and obtain money and property by means of untrue statements of material fact and omitted to state material facts necessary in order to make the statements made not misleading, and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon Plaintiff.

WHEREFORE, Plaintiff prays for compensatory and punitive damages, attorney's fees and the costs of this action.

Count II

12. The foregoing allegations are herein realleged.

13. MERRILL LYNCH violated Chapter 517, Fla. Stat., in connection with the sale of the securities herein alleged in this state to Plaintiff by, *inter alia,* directly and indirectly employing devices, schemes and artifices to defraud, by obtaining money and property by means of untrue statements of material fact and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, by engaging in transactions, practices and courses of business which operated as a fraud and deceit upon Plaintiff in connection with the purchase of said securities.

WHEREFORE, Plaintiff prays for compensatory and punitive damages, attorney's fees and the costs of this action.

Count III

14. The foregoing allegations are herein realleged.

15. MERRILL LYNCH knew that the aforesaid statements and omissions were false statements made without knowledge of their truth or falsity or said statements were made under circumstances under which their falsity should have been known, and each said statement was made with the intention that the representations or omissions would induce Plaintiff to act, all of which resulted in consequent injury and damage to Plaintiff in acting on reliance of the representations and omissions herein alleged.

WHEREFORE, Plaintiff prays for compensatory and punitive damages, attorney's fees and the costs of this action.

Count IV

16. The foregoing allegations are herein realleged.

17. MERRILL LYNCH owed Plaintiff a fiduciary duty to manage the assets, investments and securities herein described properly and to counsel and advise Plaintiff consistent with the fiduciary duty owed Plaintiff.

18. MERRILL LYNCH has breached said fiduciary duty by the practice as aforesaid alleged to the damage of Plaintiff.

WHEREFORE, Plaintiff prays for compensatory and punitive damages, attorney's fees and the costs of this action.

Count V

19. The foregoing allegations are herein realleged.

20. MERRILL LYNCH has charged and collected from Plaintiff, in Plaintiff's margin account, without Plaintiff's knowledge or consent, interest at rates which exceed 10%, which is illegal and usurious under Florida law.

21. The charging and collecting of illegal interest by MERRILL LYNCH was done willfully and with knowledge of Florida's usury laws.

WHEREFORE, Plaintiff demands judgment for damages against MERRILL LYNCH.

Count VI

22. The foregoing allegations are herein realleged.

23. Plaintiff, on behalf of all others similarly situated, reasserts and herein realleges each of the foregoing counts of this Complaint.

24. Plaintiff has retained the undersigned counsel to represent him and the class and has agreed to pay, and counsel are entitled to, a reasonable fee for such representation.

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, demands compensatory damages against MERRILL LYNCH in a sum estimated to exceed $10,000,000.00, punitive damages against MERRILL LYNCH in a sum estimated to exceed $100,000,000.00, attorney's fees and the

costs of this action, and further prays that an injunction issue restraining MERRILL LYNCH from further violations of the securities laws and Regulation T of which Plaintiff herein complains.

Count VII

25. The foregoing allegations are herein realleged.

26. Plaintiff, on behalf of himself and all others similarly situated, prays that an injunction be issued restraining MERRILL LYNCH from further violations of the securities laws, Regulation T, and the usury laws of Florida, which are complained of herein.

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, demands that an injunction be issued against MERRILL LYNCH restraining MERRILL LYNCH from further violation of the securities laws, Regulation T, and the usury laws of Florida, which are complained of herein.

TRIAL BY JURY IS DEMANDED.

SMATHERS & THOMPSON
Attorneys for Plaintiff
1301 Alfred I. duPont Building
Miami, Florida 33131
(305) 379-6523

By /s/ JAMES W. CRABTREE
James W. Crabtree

APPENDIX D

List of Matters in Which Respondent's Law Firm Has Represented Petitioner

a. *Thomas G. Alderson* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.* (Case No. 72-132-Civ.-NCR)—United States District Court for the Southern District of Florida;

b. *Herman T. Byrne* v. *Merrill Lynch, Pierce, Fenner & Smith Incorporated and Arthur Pritchard* (Case No. 73-8952)—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

c. *Pat W. Starbeck* v. *Merrill Lynch, Pierce, Fenner & Smith Inc. and Gerald Humphries* (Case No. 76-6371-Civ.-CA)—United States District Court for the Southern District of Florida;

d. *Linda Owens* v. *Vivian Frost Roe, et al.* (Case No. 75-19501)—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

e. *Publisher's Vending Services, Inc.* v. *A.P. McCorkle* (Case No. 71-6139)—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

f. *Paul Winkleman* v. *Merrill Lynch, Pierce, Fenner & Smith Incorporated* (Case No. 72-1986-Civ.-WM; *see also* Case No. 74-905-Civ.-WM)—United States District Court for the Southern District of Florida;

g. *L.D. Boggs* v. *City of Coral Gables, et al.* (Case No. 72-9417)—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

h. *Merrill Lynch, Pierce, Fenner & Smith Incorporated* v. *Joseph Van Voast*—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

Appendix D

i. *Merrill Lynch, Pierce, Fenner & Smith Incorporated* v. *Gary J. Graham*—Circuit Court, Eleventh Judicial Circuit, Dade County, Florida;

j. *Merrill Lynch, Pierce, Fenner & Smith Incorporated* v. *Investments Limited, Manuel Kaufman and Robert Kaufman;*

k. *Arthur F. McCormick* v. *James V. Esposito, et al.*—United States District Court for the Southern District of Florida, *aff'd*, 500 F.2d 620 (5th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975).

Certificate of Service

It is hereby certified that three copies of the foregoing Petition for Certiorari have been served on counsel for respondent:

GEORGE W. WRIGHT, JR.
Suite 1000
28 West Flagler Street
Miami, Florida 33130

JAMES W. CRABTREE
SMATHERS & THOMPSON
1301 Alfred I. DuPont Building
Miami, Florida 33131

by mail post-paid this 7th day of August, 1981. Thus, all parties required to be served have been served.

.....
James B. May

Opposition

Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-252

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Petitioner,

vs.

CARL R. DUNCAN,
on behalf of himself and
all others similarly situated,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Respondent

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on behalf of himself and
all others similarly situated,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

Omitted pursuant to Rule 34.2.

LIST OF ALL PARTIES

The caption of this case in this Court contains the names of all parties to this proceeding.

CITATION TO OPINIONS AND JUDGMENTS BELOW

Omitted pursuant to Rule 34.2.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

Omitted pursuant to Rule 34.2.

STATUTES AND CANONS INVOLVED

Omitted pursuant to Rule. 34.2.

REFERENCES

Petitioner Merrill Lynch, Pierce Fenner & Smith, Inc. will be referred to herein as Merrill Lynch; respondent Carl R. Duncan as Duncan.

Smathers & Thompson, Duncan's counsel whose disqualification is at issue, will sometimes be referred to as the Smathers firm.

All references to appendices are to Appendices A and B attached to the petition.

STATEMENT OF THE CASE

Respondent/plaintiff Duncan cannot accept as accurate, or material, considerable of the factual detail set forth in the statement of the case by petitioner/defendant Merrill Lynch.

Rather than correcting and answering the inaccuracies, omissions and immaterialities in specificity, however, and mindful of Rule 22.2 requiring this brief to be as short as possible, Duncan suggests attention to the statement of the United States Court of Appeals for the Fifth Circuit in its decision which Merrill Lynch here seeks to have reviewed, attached to the petition as Appendix A. More particularly, Duncan points to pages A-2 and A-3 (review of Duncan's complaint), and A-4 through A-8 of Appendix A, where the Court of Appeals reviews the factual background of this case to the point of its arrival in the Court of Appeals, and covers practically all of the matters set forth in the petition's statement of the case in a more accurate and objective

presentation. Other relevant factual details are set forth in the Court of Appeals' decision on the merits (A-16 through A-29), following the Court of Appeals' determination that the District Court's order granting the Merrill Lynch motion to disqualify Duncan's counsel was appealable (A-8 through A-16).

The Merrill Lynch Motion to Disqualify and the Matters Submitted in Support. The facts material to state here are that, without responding to Duncan's security fraud complaint, Merrill Lynch moved to disqualify Duncan's counsel, Smathers & Thompson, on the ground that, by representing Duncan, the Smathers firm was in violation of Canons 4 and 9 of the ABA Code of Professional Responsibility.

In support of the disqualification motion, Merrill Lynch filed the affidavit of Daniel A. Dolan, a Merrill Lynch executive who headed its legal department. With respect to Canon 4, requiring a lawyer to preserve the confidences of a

client, the affidavit asserted that Smathers & Thompson had formerly represented Merrill Lynch in a number of matters, and, without stating the issues involved, the nature or scope of any former matter in particular (except in the hereafter mentioned case of McCormick v. Esposito), gave a statement in the most vague and general terms about what all of the matters together, and the work done by the Smathers firm, involved (App. A-4, A-5). With regard to Canon 9, the affidavit recited the Behar -Alderson matter, about which the petition of Merrill Lynch says so much.

Hearing On the Motion to Disqualify and the District Court's Order Granting the Motion. The District Court heard oral argument, but no evidence, at a short hearing on the Merrill Lynch disqualification motion. Thereafter, on the basis of the facts set forth in the Dolan affidavit, the District Court entered an order granting the motion and disqualified Smathers & Thompson.

The District Court's order of disqualification recited the substantial relationship rule, stated the issue in the motion to be whether Smathers & Thompson's prior representation of Merrill Lynch involved issues substantially related to the matters in Duncan; recited the basic allegations of the complaint and recited the affidavit of Dolan and the contentions and claims in it, particularly with respect to Dolan's assertions of Smathers & Thompson's investigations into Merrill Lynch's records, interviews of Merrill Lynch's employees, and other preparatory research which would familiarize Smathers & Thompson "with the internal procedures and policies of Merrill Lynch". The court quoted the following, among other things, from Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), at p. 224:

> The substantial relationship test [requires that] evidence need only establish the scope of the legal representation and not the actual receipt of the allegedly relevant confidential information. Then only where it is clearly discernible, "that

> the issues involved in a current case do not relate to the matters in which the attorney formerly represented the adverse party will the attorney's present representation be treated as measuring up to the standards of legal ethics." (App. B, B-1, B-4)

The court then stated its opinion that, in the light of the Westinghouse language, Smathers & Thompson must be disqualified, stating, with respect to Canon 4:

> According to this court's reading of Westinghouse, disqualification appears necessary because of the many communications which invariably passed from Merrill Lynch to Smathers & Thompson in the course of that relationship. Although the previous cases may not involve the identical issues involved here, the court feels that Smathers & Thompson would certainly have been exposed to information which would be substantially related to the instant case. It seems clear that a law firm that is privy to a client's procedures and policies, and is able to examine internal memoranda as well as interview witnesses, is certainly given an opportunity to benefit from any privileged information so gathered in a

subsequent law suit against that client. See Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977). It is likewise clear that there is a "possibility" that confidences were disclosed, and that the court cannot clearly discern that the issues in this case are unrelated to those previous matters. Westinghouse, supra. A finding that the substantial relationship test has been met is supported in light of the defendant's industry and the allegation in the complaint. The previous cases may be termed as "garden variety" securities cases. But if, while representing Merrill Lynch in those cases, Smathers & Thompson became aware of company procedures and practices that would aid a future client against a former client, certainly Canons 4 and 9 would be violated. This is particularly true where the complaint against the former client alleges conduct that would have to have been pervasive and consistent enough to injure an entire class of plaintiffs. Certainly Smathers & Thompson would have learned things during the course of representation which would aid them unfairly in the prosecution of their action. (App. B, B-4, B-5).

With respect to Canon 9, the District Court stated only:

> Finally, the court is mindful of Canon 9 which prohibits even the appearance of impropriety.
>
> > If the [lawyer-client] relationship is to be an effective one, it must exist in an atmosphere of complete and open communication. If a client conducts legal affairs in a guarded and restrained manner out of fear that even the most innocuous statement to counsel may come to haunt him at a later date, our legal system will suffer.
>
> Florida Realty, Inc. v. General Development Corp., 459 F. Supp. 781, 784 (S.D. Fla. 1978). This consideration forces the court to conclude that Smathers & Thompson cannot prosecute this action against its former client. (App. B, B-5, B-6).

Duncan's Appeal From the District Court's Order Granting the Motion to Disqualify Duncan's Counsel. From the District Court's order granting the disquali-

fication motion, Duncan immediately appealed, pursuant to 28 U.S.C. § 1291, to the United States Court of Appeals for the Fifth Circuit. 1/

Pending the appeal, this Court ruled, in Firestone Tire & Rubber Co. v. Risjord, ____ U.S. ____, 101 S.Ct. 669 (1981), that orders denying motions to disqualify counsel did not meet the "collateral order" test, and were not appealable under § 1291. This Court, however, expressly withheld any opinion on whether orders granting disqualification motions were appealable.

The Court of Appeals' Decision in the Instant Case. In its decision in the in-

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1/ From its first decision in 1961 on appealability of orders dealing with counsel disqualification motions, Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333, 334 (CA 5 1961), the Fifth Circuit had consistently held such orders to be immediately appealable under the "collateral order" doctrine, whether the order granted the motion to disqualify; Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171 (CA 5 1979), or denied such motion; Musicus v. Westinghouse Electric Corp., 621 F.2d 742, 743 n. 1 (CA 5 1980).

stant case, the Court of Appeals for the Fifth Circuit noted that, while its former decisions allowing appeals from orders denying disqualification motions had been overruled by this Court's Firestone decision, the instant case involved an order granting a disqualification motion, on the appealability of which Firestone had expressed no opinion.

Accordingly, the Court of Appeals first considered and determined appealability of the District Court's order, then the merits of the appeal, and ruled that:

1. The District Court's order granting the motion of Merrill Lynch to disqualify the Smathers firm met the requirement of Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), overcame the deficiency pointed out in Firestone, and was immediately appealable pursuant to 28 U.S.C. § 1291 (App. A-8, A-16);

2. (a) The District Court had erroneously placed on Duncan the burden of

proving that Smathers & Thompson's former legal representation of Merrill Lynch was not substantially related to the instant case, rather than requiring Merrill Lynch to prove that it was (App. A-17, A-18);

(b) Even had the District Court properly placed the burden of proof on Merrill Lynch, the matters submitted in support of substantial relationship were insufficient to establish such relationship, and the case must be remanded for application of proper legal principles (App. A-18, A-22);

(c) With respect to one case, McCormick v. Esposito, which bore some similarity to the instant one, and had been treated separately from the other matters in the Dolan affidavit, Merrill Lynch was not entitled to the conclusive presumption that Merrill Lynch had disclosed to the Smathers firm confidences relevant to the instant case. The client whose claimed wrongs resulted in the McCormick litigation and whose confidences were involved in McCormick was a stock

brokerage partnership, Goodbody & Company. Merrill Lynch's only relationship with McCormick was that a Merrill Lynch corporate subsidiary acquired the partnership while the McCormick-Goodbody dispute pended, and Merrill Lynch retained and paid the Smathers firm, which was representing the partnership at the time of the acquisition; wherefore, proof only of a substantial relationship between McCormick and the instant case would not disqualify the Smathers firm, for Merrill Lynch had no reason to disclose confidences in McCormick. But if Merrill Lynch claimed Smathers & Thompson had access to information other than that necessary to defend the partnership, Merrill Lynch should present evidence of the law firm's access to such information and that it was relevant in the pending case (App. A-22, A-24);

(d) The case of Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), relied upon heavily by Merrill Lynch, was distinguishable, in that there Gulf Oil, a defendant in a uranium price fixing antitrust action,

moving for disqualification of its former counsel, who was representing another party in the action, had delineated the types of confidential information it had entrusted to its former counsel in a real estate transaction (information relating to the quantity and quality of Gulf's uranium reserves and its reasons for delaying production of those reserves), the disclosure of which information rendered the real estate transaction substantially related to the then pending uranium price fixing antitrust action in which the former counsel represented another party. The citing by Merrill Lynch of Westinghouse merely illustrated what Merrill Lynch should have done but did not do. Further, the case of Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (CA 2 1977), also relied on by Merrill Lynch to apply to Smathers & Thompson the proposition that former counsel privy to a client's internal "practices and procedures" should be disqualified from opposing its former client, was inapposite because, in Fund of Funds the law firm to which this proposition was applied had for 15 years represented the client as general counsel,

whereas the Smathers firm had not been general, but only local, counsel, representing Merrill Lynch in a limited number of local matters for the duration of each matter, and such confidential information the firm learned pertained only to the matters then at hand; further, the Court of Appeals stated:

> Merrill Lynch cannot have Smathers & Thompson disqualified simply by stating that the firm has knowledge of Merrill Lynch's "practices and procedures". Instead, it must prove that Smathers & Thompson has knowledge of the particular practices and procedures which are the subject matter of Duncan's suit. It can do this either by establishing that the present and previous representations are substantially related or by pointing to specific instances where it revealed confidential information regarding its practices and procedures. Merrill Lynch has failed to do either (App. A-24, A-27).

(e) The District Court's statement, concerning Canon 9 that "Finally, the court is mindful of Canon 9 which

prohibits even the appearance of impropriety," provided no basis for determining the reason the District Court felt Smathers & Thompson's representation of Duncan was prohibited by Canon 9. In the Court of Appeals Merrill Lynch claimed it had twice met the Court of Appeals' two-part test for determining disqualification for an appearance of impropriety [2]; (1) by showing an actual impropriety in Smathers & Thompson's violation of Canon 4 by taking a case against Merrill Lynch that was substantially related to the firm's former representation of Merrill Lynch; and (2) by showing the Smathers firm's misconduct in the Behar matter. But neither of these two matters met the Court of Appeals' test because (1) Merrill Lynch had not yet shown that the former

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2/ The Court of Appeals' test: (1) the trial court must find some "specifically identifiable appearance of improper conduct" and (2) the court must "find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case" (App. A-27).

representation of Merrill Lynch was substantially related to the instant case, and (2) the Behar matter had nothing to do with the present action; furthermore, any impropriety with respect to Behar was purged when the Smathers firm withdrew as counsel for Behar (App. A-27, A-28).

Upon the foregoing determinations, the Court of Appeals vacated the District Court's order and remanded the case for an appropriate determination by the District Court as to whether the Smathers firm should be disqualified, stating:

> We conclude that the district court erred in disqualifying Smathers & Thompson from representing Duncan in his action against Merrill Lynch. On remand, the court should, in accordance with the principles we have outlined, require Merrill Lynch to bear the burden of proving that Smathers & Thompson's current representation of Duncan is substantially related to the firm's former representation of Merrill Lynch. In applying the substantial relationship test, the court should require Merrill Lynch to delineate with greater specificity the scope of the prior

> representation and to demonstrate precisely how the subject matters of the prior representation are connected with the matters embraced within the pending suit. Should the court then determine that disqualification is warranted, it should enter detailed findings of fact which set forth the bases for its conclusion (App. A-29).

SUMMARY OF ARGUMENT

Question 1. With respect to question one presented by the petition, i.e., whether an order granting a party's motion to disqualify an opposing party's counsel is immediately appealable under 28 U.S.C. § 1291 pursuant to the "collateral order" doctrine:

It is Duncan's position that, while the record in this case clearly supports presentation of this question, the issue at this point is not whether the order is appealable, but whether this Court should grant certiorari for the purpose of determining whether the order is appealable, and that this question, at least at the present time, does not meet the criteria

set forth in this Court's Rule 17 for a grant of certiorari.

Question 2. With respect to question two, i.e., whether a party seeking to disqualify his former counsel and prevent him from representing an opponent must show the possession by its former counsel of specific confidential information, or whether a showing of substantial relationship between the prior and pending litigation is sufficient.

The record in this case does not support such question. The Court of Appeals did not rule as the Merrill Lynch Question 2 tries to make it appear. Rather, the Court of Appeals stated its rule concerning the Canon 4 disqualification test as follows:

> The party seeking disqualification is not required to point to specific confidences revealed to his former attorney that are relevant to the pending case. Instead, he "need only to show that the matters embraced within the pending suit are substantially related to the matters or

> cause of action wherein the attorney previously represented him." Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977); In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). Once the former client proves that the subject matters of the present and prior representations are "substantially related", the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation.

Merrill Lynch has distorted and misrepresented what the Court of Appeals ruled with respect to McCormick v. Esposito, discussed in pages 12 and 13 of this brief, and by the Court of Appeals in App. A, pages A-22 through A-24.

Furthermore, Merrill Lynch presents nothing to meet this Court's Rule 17 requirements for a grant of certiorari to review this question.

Question 3. With respect to Question 3, i.e., whether, in a proceeding by a party moving to disqualify counsel under Canon 9, which requires that a lawyer avoid even the appearance of professional impropriety, the moving party must show that its former counsel engaged in misconduct under some other Canon of the Code:

Merrill Lynch claims that Smathers & Thompson engaged in professional misconduct in accepting representation against Merrill Lynch in Behar while the dormant Alderson case, with the Smathers firm counsel of record for Merrill Lynch, was still pending. Merrill Lynch claims that this constituted a violation of Canon 9 for which the Smathers firm should have been held to be disqualified to represent Duncan in the instant case. In short, Duncan should be punished along with Smathers & Thompson for Smathers & Thompson misconduct which is in no way related to the instant case.

If the District Court even so much as considered Behar in its disqualification

order, it is not possible to discern it from the order.

The Court of Appeals ruled that Behar had nothing to do with the instant action and could not provide a ground for disqualification of the Smathers firm as counsel for Duncan under Canon 9. This is the position of Duncan.

Furthermore, the Court of Appeals has not ruled as Merrill Lynch's Question 3 indicates it did, as a careful reading of the Court of Appeals' opinion will show. The Court of Appeals' rule with respect to a Canon 9 disqualification of counsel is stated by the Court and referred to as:

> * * *this Circuit's two-part test for determining when an attorney should be disqualified for an appearance of impropriety: (1) the trial court must find some "specifically identifiable appearance of improper conduct" and (2) the court must "find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case." Woods v.

> Covington County Bank, 537 F.2d 804, 812 and 813 n. 12 (5th Cir. 1976).

The foregoing rule is distorted by Merrill Lynch's Pet. pp. 18, 19, into:

> The Fifth Circuit below, however, engrafted a second requirement on this Canon [9] - not a mere appearance of impropriety, but also proof of some other substantive misconduct, thereby rendering Canon 9 a nullity. * * * in order to meet the first prong, one must prove that a violation of some other Canon has occurred. (Matter in brackets supplied).

The above Merrill Lynch assertion is neither a fair nor a reasonable interpretation of the Court of Appeals' rule, and the Merrill Lynch Question 3 and its argument is not a viable proposition.

Here again, Merrill Lynch submits nothing to meet this Court's Rule 17 criteria for granting certiorari.

Still further, both Questions 2 and 3, as presented by petitioner, are merely

vehicles for giving the defeated party in the Court of Appeals another hearing - a purpose not within the scope of a certiorari proceeding in this Court.

ARGUMENT

QUESTION 1

> IS AN ORDER GRANTING A MOTION TO DISQUALIFY COUNSEL AN APPEALABLE ORDER UNDER THE "COLLATERAL ORDER" DOCTRINE, EVEN THOUGH AN ORDER DENYING DISQUALIFICATION IS NOT APPEALABLE UNDER THIS COURT'S HOLDING IN FIRESTONE TIRE & RUBBER CO. v. RISJORD, 101 S.Ct. 669 (1981)?

First, respondent notes that petitioner's argument on question 1 presented by the petitioner, in practicality, ignores the criteria for this Court to grant certiorari under Rule 17.

Merrill Lynch asserts, in its heading under its argument on question 1 (Pet., p. 8):

> The Appealability of Orders Granting Disqualification of

> Counsel Is an Important Question of Federal Appellate Jurisdiction That Should Be Determined by This Court.

Again, the petition (p. 9) states:

> This Court should grant the petition for certiorari to stem the tide of interlocutory appeals from disqualification orders that has been engendered by the Cohen doctrine.

But nowhere does Merrill Lynch present any matters in support of its rhetorical conclusion that certiorari should be granted.

A review of the decisions leading up to whether an order granting a motion to disqualify an opponent's counsel is appealable under the "collateral order" doctrine is pertinent to the question of whether this Court should grant certiroari in this case.

The bankground decision out of which this point arises is Firestone Tire &

Rubber Co. v. Risjord, _____ U.S. _____, 101 S.Ct. 669 (1981), which reviewed a judgment of the United States Court of Appeals for the Eighth Circuit holding that an order denying a motion to disqualify the opposing party's counsel is not immediately appealable under 28 U.S.C. § 1291, pursuant to the "collateral order" doctrine.

In Firestone, this Court reviewed Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), construing § 1291 to permit, during the course of an action, immediate appeal from a small class of final "collateral orders" without awaiting final judgment on the merits. It also reviewed its more recent supplement to Cohen's principle, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), setting forth three requirements for such "collateral orders" as follows:

> [T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

The Court in Firestone held that an order denying a motion to disqualify counsel conclusively determined the disputed question, and the Court assumed without deciding that it resolved an important issue completely separate from the merits of the action. But the Court ruled that it had not been demonstrated that such an order could not be effectively reviewed on appeal from final judgment; therefore it did not meet the third part of the Coopers & Lybrand test and was not immediately appealable under the collateral order doctrine.

The Eighth Circuit, in its decision en banc in Firestone, [3/] because it was overruling its prior cases holding orders denying disqualification motions to be appealable, had, following its ruling on appealability, decided the merits of the appeal. This Court ruled that the Eighth Circuit's decision on appealability was

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3/ Sub nom In re Multi-Rim Products Liability Litigation, 612 F.2d 377 (CA 8 1980).

correct; consequently that court had no jurisdiction to decide the merits, and thus this Court vacated the judgment, with instructions to the Court of Appeals to dismiss the appeal.

The Eighth Circuit had also stated that district court orders granting, as distinguished from orders denying, motions to disqualify counsel would continue to be appealable as they had been before (612 F.2d 378). This Court noted such statement, commented that appealability of orders granting disqualification was not presented by the Firestone petition, and expressed no opinion on the point.

Six days after the Firestone decision, in McAlpin v. Armstrong, _____ U.S. _____, 101 S.Ct. 911 (1981), this Court granted certiorari and summarily vacated, with instructions to dismiss the appeal, an en banc decision of the United States Court of Appeals for the Second Circuit which had also overruled former decisions and held that orders denying disqualification

motions were not appealable, but, like Firestone, had decided the merits of the appeal. The Second Circuit's decision in McAlpin [4/] also had discussed at length appealability of orders granting disqualification motions and, like the Eighth Circuit in Firestone, had ruled that such orders met the Coopers & Lybrand test, and would continue to be appealable under § 1291 (625 F.2d 440, 441).

The question of appealability under § 1291 of an order granting a motion to disqualify opposing counsel is clearly presented to this Court by the record and the petition in the instant case.

But the issue at this point is not whether the order of the district court granting the motion to disqualify Duncan's counsel is appealable, but whether this Court should grant certiorari to decide whether it is; in short, are there "spe-

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4/ Sub nom Armstrong v. McAlpin, 625 F.2d 433 (CA 2 1980).

cial and important reasons" for granting certiorari here, and does this case and this question meet the criteria set forth in this Court's Rule 17 for the granting of certiorari?

In Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923), this Court commented that jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision in the circuits, and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by the court of last resort. The Court further stated:

> The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.

Further, in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955), the Court said, at 349 U.S. 74:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Certiorari was granted in Firestone, and presumably in McAlpin, because of the conflict of decision among the circuits. The court of appeals in every circuit had ruled on whether an order denying a disqualification motion was appealable under § 1291, and, at the time of Firestone, the rule in six circuits was that such orders were not appealable, while the rule in the

remaining five was that they were. See Firestone, 101 S.Ct. 673 and note 10, citing the current ruling decision in each circuit.

No such conflict exists on the question of appealability of an order granting a motion to disqualify counsel.

The instant case is the first and only ruling on appealability of an order granting a disqualification motion since this Court's decisions in Firestone and McAlpin. The instant decision, of course, is that the order is appealable. In addition to the instant case, the statements of the second and eighth circuits that such orders are appealable, despite their contrary rulings on orders denying disqualification motions, have already been noted at pages 28 and 29 of this brief. Since in each circuit the decision was en banc, it hardly seems reasonable to expect either of these two Courts of Appeals to change their views on appealability of orders granting disqualification, even though their former decisions dealing with

orders denying disqualification were vacated on grounds unrelated to what they had to say about orders granting disqualification.

Further, the United States Court of Appeals for the Sixth Circuit, which had ruled against appealability of orders denying disqualification motions, Melamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (CA 6 1979) (Melamed II), ruled in favor of appealability when presented with an order granting a motion to disqualify, General Electric Co. v. Valeron Corp., 608 F.2d 265, 266 (CA 6 1979), cert. denied 445 U.S. 930, 100 S.Ct. 1318 (1980).

The United States Court of Appeals for the District of Columbia ruled an order granting a motion to disqualify counsel in a Grand Jury proceeding to be appealable; In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605, n. 8 (CA DC 1976), saying at 531 F.2d 605, n. 8:

* * *

> We find ourselves in agreement with those cases holding that an order granting a motion for disqualification is appealable, and it is our view that the factors justifying that conclusion in the trial context are equally applicable to grand jury proceedings.

Later the same year, in Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (CA DC 1976), the same court ruled that orders denying a motion to disqualify are not appealable, and in so doing distinguished its previous ruling in In re Investigation Before April 1975 Grand Jury, noting the difference between an order granting, and an order denying, a motion to disqualify, 546 F.2d 1026, n. 22.

In In re Continental Investment Corp., 637 F.2d 1 (CA 1 1980), the Court of Appeals for the First Circuit, in ruling that orders denying disqualification motions are not appealable, noted that other circuits had ruled orders granting disqualifcation motions to be appealable, but stated that its decision did not reach

the appealability of such orders (637 F.2d 7).

In In re Fine Paper Antitrust Litigation, 617 F.2d 22 (CA 3 1980). The Court of Appeals for the Third Circuit, in ruling unappealable an order denying a motion to disqualify counsel in a class action case, noted that there were reasons for distinguishing an order granting a disqualification motion from an order denying such a motion (617 F.2d 26, n. 5), but did not further express itself on the matter.

The United States Court of Appeals for the Ninth Circuit ruled some years ago that an order denying a disqualification motion is not appealable, Cord v. Smith, 338 F.2d 516, 521 (CA 9 1964), but has never expressed itself on appealability of orders granting such motions.

The remaining circuits, the Fourth, Seventh and Tenth, prior to Firestone, have held both orders denying and orders granting disqualification motions to be

appealable, [5/] and have not spoken on the issue of appealability since Firestone.

Thus, with every circuit which has expressed itself on the matter stating that orders granting disqualification are appealable, it is submitted that the question on this procedural matter does not possess the importance necessary to justify a grant of certiorari.

On the merits of appealability, the discussion of the United States Court of Appeals for the Second Circuit in its en banc opinion in Armstrong v. McAlpin, 625 F.2d 433, at pp. 440, 441 (CA 2 1980), judgment vacated, _____ U.S. _____, 101 S.Ct. 911 (1981), and the discussion of

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5/ Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (CA 4 1978), cert. denied, 439 U.S. 821 (1978), citing MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (CA 4 1977); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (CA 7 1976); Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (CA 7 1978), cert. denied 439 U.S. 955 (1978); Fullmer v. Harper, 517 F.2d 20, 21 (CA 10 1975); State of New Mexico v. Aamodt, 537 F.2d 1102, 1106 (CA 10 1976), cert. denied 429 U.S. 1121 (1977).

the Court of Appeals for the Fifth Circuit in the instant case, App. A, pp. A-8 through A-16, support appealability of the instant order better than anything Duncan could say.

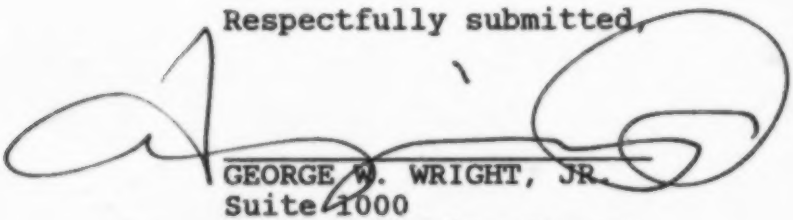
QUESTIONS 2 AND 3

Duncan will not present argument on Questions 2 and 3 further than that already presented in his summary of argument.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 1981, three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served by First Class United States Mail, post paid, on each of the following parties, to wit:

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By the foregoing service all parties required to be served have been served.

GEORGE W. WRIGHT, JR.

Petitioner's Reply Brief

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CLERK

No. 81-252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

CARL R. DUNCAN, on behalf of himself and all others similarly situated,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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No. 81-252

IN THE

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OCTOBER TERM, 1981

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Petitioner,

v.

CARL R. DUNCAN, on behalf of himself
and all others similarly situated,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This reply brief is submitted in further support of the petition of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision and judgment of that court, which vacated the order of the United States District Court for the Southern District of Florida disqualifying counsel for respondent Carl R. Duncan ("Duncan") from further representation of Duncan in this purported securities class action.

I.

The Appealability of Orders Disqualifying Counsel Is an Appropriate and Timely Issue for Decision by This Court.

Respondent Duncan argues in response to Merrill Lynch's petition for certiorari that the question whether orders disqualifying counsel are appealable orders does not meet

the criteria for certiorari jurisdiction set forth in this Court's Rule 17. This Court has, however, granted certiorari in a number of cases to consider whether interlocutory orders satisfy the requirements of the collateral order doctrine and thus qualify as "final decisions" appealable under 28 U.S.C. § 1291. In particular, this Court granted certiorari to consider whether orders denying disqualification of counsel are appealable orders under the collateral order doctrine, and held that such orders are not appealable. *Firestone Tire & Rubber Company* v. *Risjord*, 101 S. Ct. 669 (1981). The issue presented in *Firestone* was, however, only one part of the broader question of the appealability of orders deciding attorney disqualification motions; another aspect of that question is presented here. Certainly, if the issue decided in *Firestone* was an important question of federal appellate jurisdiction requiring determination by this Court, then the issue presented here, upon which this Court expressly reserved decision in *Firestone*, 101 S. Ct. at 672 n.8, is at least equally significant.

Duncan's only argument on this point is that "every circuit which has expressed itself on the matter [has held] that orders granting disqualification are appealable . . . ." (Resp. Brief at 36)*. Merrill Lynch submits, however, that uniformity of decision on a question of federal jurisdiction should not be deemed dispositive unless the substantive resolution of the jurisdictional question is correct, which only this Court can ultimately decide. Duncan's survey of decisions of various courts of appeals that have opined on the matter reveals the significance of the question presented by Merrill Lynch's petition. (*See* Resp. Brief at 27-29, 32-36). It is apparent from his summary that motions to disqualify counsel have occupied much

* Reference is to Respondent's Brief in Opposition to Petition for Writ of Certiorari. References to the Appendix to the Petition for Certiorari will be cited "A-....".

judicial time and energy and that the courts of appeals have repeatedly exercised jurisdiction over interlocutory appeals from orders deciding disqualification motions.* The importance of the question whether such an exercise of jurisdiction is proper under 28 U.S.C. § 1291 cannot be eradicated simply by reference to the absence of a conflict among the circuits.

Merrill Lynch submits that the decision of the Fifth Circuit below, and the holdings and dicta in the numerous similar decisions surveyed by Duncan himself, violate the stringent requirements of the collateral order doctrine as articulated in the decisions of this Court. Specifically, Merrill Lynch believes that orders disqualifying counsel *can* be reviewed on appeal from a final judgment, and may lead to reversal and further proceedings on remand. Respondent does not meet this argument, relying instead upon the decision below and upon obiter dicta in a decision from the Second Circuit that was vacated by this Court. (*See* Resp. Brief at 36, *citing Armstrong* v. *McAlpin*, 625 F.2d 433, 440-41 (2d Cir. 1980), *vacated sub nom. McAlpin* v. *Armstrong*, 101 S. Ct. 911 (1981)). In both of those decisions, the courts engaged in rank speculation as to the potential harm that might hypothetically result from the absence of interlocutory appellate review of orders disqualifying counsel.** This Court's decisions on the collateral

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* The Fifth Circuit alone has considered more than half a dozen interlocutory appeals from orders disqualifying counsel in the last five years, and at least as many from orders denying disqualification. (*See* 646 F.2d at 1024-25; A-10 (listing cases)).

** In justifying immediate interlocutory appellate review below, the Fifth Circuit pointed to the harm to the disqualified attorney, who is "not likely to find any remedy for the damage to his reputation or to his pocketbook" (646 F.2d at 1027; A-15), echoing a similar observation in *McAlpin*, 625 F.2d at 441. Hypothetical injury arguably to be sustained by a disqualified attorney hardly justifies the exercise of appellate jurisdiction, at least in the eyes of the former client who successfully moved for disqualification on the basis of a violation of the Code of Professional Responsibility.

order doctrine, however, dictate that interlocutory appellate review cannot be premised upon sheer speculation. *Firestone, supra,* 101 S. Ct. at 674, 675, 676 n.13. If this Court denies Merrill Lynch's petition, the decision below will result in the continued erroneous assumption of appellate jurisdiction which Congress has not seen fit to confer upon the federal courts of appeals under 28 U.S.C. § 1291.

II.

Interpretation of the Code of Professional Responsibility Is an Issue Worthy of This Court's Consideration.

Duncan also urges that the requirements of this Court's Rule 17 are not met by the questions raised by the petition concerning Canons 4 and 9 of the Code of Professional Responsibility. As the supreme judicial body in the United States, however, this Court has a unique role and responsibility in the eyes of the judiciary, the bar, and the public for ensuring that the professional ethics of the attorneys who appear in federal courts meet the high ethical standards embodied in the Code; indeed, this Court should be at the forefront of efforts to foster such standards and to elevate the public image of the bar. The professional conduct of attorneys in federal courts is plainly an issue within the scope of this Court's supervisory powers. A decision by this Court construing the Code of Professional Responsibility would provide needed guidance to the federal courts and persuasive authority for other courts and the bar as well. Merrill Lynch respectfully urges this Court to acknowledge its preeminent role in articulating standards for professional conduct, and to overturn the narrow construction of attorneys' responsibilities under the Code endorsed by the court below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 1981

Certificate of Service

It is hereby certified that three copies of the foregoing Petitioner's Reply Brief in Support of Petition for Certiorari have been served on counsel for respondent:

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by mail post-paid this 25th day of September, 1981. Thus, all parties required to be served have been served.

.....

James B. May